Central Law Journal.

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Chapter VII.—Probable Cause.
Chapter VIII.—Advice of Counsel.
Chapter IX.—End of the Prosecution.
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" VI. Liability for Neglecting Municipal Duties Relating to Governmental Affairs.—Highways.
" VII. American Authorities as to Common Law Liability for Neglect to Repair Highways.
" VIII. Extent of Liability for Neglect to Repair Highways.
" IX & X. Duties of Municipal Corporations Respecting Streets and Roads.
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" XII. Snow and Ice on Streets and Sidewalks.
" XIII. Bridges—Negligent Construction.
" XIV. Bridges—Neglect to Repair.
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ST. LOUIS, MO., JULY 1, 1892.

With this issue of the CENTRAL LAW JOURNAL begins the nineteenth year of its publication, having long ago passed out of the limit of experiment into the realm of permanency. It will not be expected of the publishers at this time to indulge in any promises; what has been accomplished is an indication of what may be looked for in the future. This issue is printed from new type and adorned with a new head, and its general appearance materially improved. Those who have looked to the CENTRAL LAW JOURNAL for the information it disseminates may reasonably expect, from its past history, an anticipation of all their needs and requirements for the future.

The Supreme Court of the United States may have been technically correct in refusing to assume jurisdiction in the case of O'Neil v. State of Vermont, but the action of the court resulted in great hardship and substantial wrong to the defendant, which the vigorous dissent of Mr. Justice Field, concurred in by Mr. Justices Harlan and Brewer, makes very clear. The defendant, a liquor dealer in the State of New York, received from persons in Vermont orders for liquors, which he filled by delivering to an express company, in the State of New York, for delivery to the consignees in Vermont, on payment of the bill attached. Upon such facts he was tried and convicted in Vermont for selling intoxicating liquors. Under one complaint charging the sale of intoxicating liquors, he was convicted of 307 separate offenses against the Vermont liquor law, under which he was sentenced to pay a fine of $6,638.72, or in default be imprisoned at hard labor for 19,914 days. The case was appealed from the Vermont to the Federal Supreme Court, upon the ground that a federal question was involved, and a reversal was sought from the latter court, because, first, the punishment was "cruel and unusual" within the inhibition of the eighth amendment to the constitution; and second, the conviction was in derogation of the interstate commerce clause of the federal constitution. Jurisdiction, however, was refused upon the ground that the question of cruel and unusual punishment, although raised below, was not assigned as error nor suggested in the brief of plaintiff in error, and that the points raised at the trial were too general to call the attention of the State court to the clause of the federal constitution in regard to the regulation of commerce, or to any right claimed under it, and the only question considered by the supreme court of the State being whether the liquor was sold in Vermont or New York, the conclusion being that the completed sale was in Vermont, no federal question was raised. It is undeniable that this conclusion was purely technical, and it is at the same time a striking illustration of the wrong frequently perpetrated by courts, in the eager search after proper procedure and practice. There can be no question that the punishment imposed was "cruel and unusual" within the meaning of the constitution, and, as Mr. Justice Field says, "exceded in severity—considering the offenses of which the defendant was convicted—anything which I have been able to find in the records of our courts for the present century." It is also a very grave question, to say the least, whether the transaction was not one of interstate commerce. The dissenting judges make a very strong argument on the affirmative side of that proposition. And it is not at all clear that it is necessary, to give the supreme court jurisdiction to review the judgment of a State court, that the record should show that the objection that the transactions in question were those of interstate was specifically taken in such court. To us it seems as though the court strained considerably to find an excuse for denial of jurisdiction, and many will agree with the dissenting judge who asserts that "great wrongs were inflicted, under the forms of law, upon the defendant. If there is no remedy for them, there is a defect in our laws or in their administration which cannot be too soon corrected."

NOTES OF RECENT DECISIONS.

CONTRACT—SALE OF INTOXICATING LIQUORS TO BE ILLEGALLY SOLD IN ANOTHER STATE.—In Graves v. Johnson, the Supreme Judicial Court of Massachusetts hold that a contract of sale of intoxicating liquors in Massachusetts, made with a view to their being resold in another State contrary to the laws of that State, is void and the price cannot be recovered. Holmes, J., says:

This is an action for the price of intoxicating liquors. It was found that they were sold and delivered in Massachusetts by the plaintiffs to the defendant, a Maine hotel keeper, with a view to their being resold by the defendant in Maine against the laws of that State. These are all the material facts reported, but these findings we must assume were warranted, as the evidence is not reported, so that no question of the power of Maine to prohibit the sales is open. The only question is whether the facts as stated show a bar to this action.

The question is to be decided on principles which we presume would prevail generally in the administration of the common law in this country. Not only should it be decided in the same way in which we should expect a Maine court to decide upon a Maine contract presenting a similar question, but it should be decided as we think that a Maine court ought to decide this very case if the action were brought there. It is noticeable, and it has been observed by Mr. Pollock, that some of the English cases which have gone furthest in asserting the right to disregard the revenue laws of a country other than that where the contract is made and is to be performed, have had reference to the English revenue laws. Holman v. Johnson, 1 Cowp. 341; Poll. Cont. (5th ed.) 308. See also, McIntyre v. Parks, 3 Metc. (Mass.) 207.

The assertion of that right, however, no doubt was in the interest of English commerce (Pellecat v. Angell, 2 Cromp. M. & R. 311, 313), and has not escaped criticism (Story, Confl. Laws, §§ 254, 257, note; 3 Kent, Comm. 265, 266; Whart. Confl. Laws, § 484), although there may be a question how far the actual decisions go beyond what would have been held in the case of an English contract affecting only English laws (see Hodgson v. Temple, 5 Taunt. 181; Brown v. Duncan, 10 Barn. & C. 93, 95, 98; Harris v. Runnels, 12 How. 79, 83, 84.)

Of course, it would be possible for an independent State to enforce all contracts made and to be performed within it without regard to how much they might contraven the policy of its neighbors' laws. But in fact no State pursues such a course of barbarous isolation. As a general proposition, it is admitted that an agreement to break the laws of a foreign country would be invalid. Poll. Cont. (5th ed.) 308. The courts are agreed on the invalidity of a sale when the contract contemplates a design on the part of the purchaser to resell contrary to the laws of a neighboring State, and requires an act on the part of the seller in furtherance of the scheme. Waymell v. Reed, 5 Term R. 599; Gaylord v. Soragen, 32 Vt. 110; Fisher v. Lord, 63 N. H. 514, 3 Atl. Rep. 927; Hull v. Ruggles, 56 N. Y. 424, 429.

On the other hand plainly it would not be enough to prevent a recovery of the price that the seller had reason to believe that the buyer intended to resell the goods in violation of law. He must have known the intention in fact. Finch v. Mansfield, 97 Mass. 89, 92; Adams v. Coulliard, 102 Mass. 167, 173. As in the case of torts, a man has a right to expect lawful conduct from others. In order to charge him with the consequence of the act of an intervening wrong-doer, you must show that he actually contempleted the act. Hayes v. Hyde Park, 153 Mass. 514-516, 27 N. E. Rep. 522.

Between these two extremes a line is to be drawn. But as the point where it should fall is to be determined by the intimacy of the connection between the bargain and the breach of the law in the particular case, the bargain having no general and necessary tendency to induce such a breach, it is not surprising that courts should have drawn the line in slightly different places. It has been thought not enough to invalidate a sale that the seller merely knows that the buyer intends to resell in violation even of the domestic law. Tracy v. Talmage, 14 N. Y. 162; Hodgson v. Temple, 5 Taunt. 181. So of the law of another State. McIntyre v. Parks, 3 Metc. (Mass.) 207; Sortwell v. Hughes, 1 Curt. 244; Green v. Collins, 3 Cliff. 494; Hill v. Spear, 50 N. H. 253. Dater v. Earle, 3 Gray, 482, is a decision on New York law.

But there are strong intimations in the later Massachusetts cases that the law on the last point is the other way (Suit v. Woodhall, 113 Mass. 391, 395; Finch v. Mansfield, 97 Mass. 89, 92); and the English decisions have gone great lengths in the case of knowledge of intent to break the domestic law (Pearce v. Brooks, L. R. 1 Exch. 213; Taylor v. Chester, L. R. 4 Q. B. 309, 311.)

However this may be, it is decided that when a sale of intoxicating liquor in another State has just so much greater proximity to a breach of the Massachusetts law as is implied in the statement that it was made with a view to such a breach, it is void. Webster v. Munger, 8 Gray, 584; Orcutt v. Nelson, 1 Gray, 536, 541; Hubbell v. Flint, 18 Gray, 277, 279; Adams v. Couillard, 112 Mass. 167, 172, 173. Even in Green v. Collins, and Hill v. Spear the decision in Webster v. Munger seems to be approved. See, also, Langton v. Hughes, 1 Maule & S. 593; M'Kinnel v. Robinson, 3 Mees & W. 434, 441; White v. Buss, 3 Cush. 448. If the sale would not have been made but for the seller's desire to induce an unlawful sale in Maine, it would be an unlawful sale, on the principles explained in Hayes v. Hyde Park, 153 Mass. 514, 27 N. E. Rep. 522, and Tasker v. Stanley, 153 Mass. 148, 26 N. E. Rep. 417. The overt act of selling, which otherwise would be too remote from the apprehended result—an unlawful sale by some one else—would be connected with it, and taken out of the protection of the law by the fact that that result was actually intended. We do not understand the judge to have gone so far as we have just supposed. We assume that the sale would have taken place whatever the buyer had been expected to do with the goods. But we understand the judge to have found that the seller expected and desired the buyer to sell unlawfully in Maine, and intended to facilitate his doing so, and that he was known by the buyer to have that intent. The question is whether the sale is saved by the fact that the intent mentioned was not the controlling inducement to it. As the connection between the act in question, the sale here, and the illegal result, the sale in Maine—its tendency to produce it—is only through the later action of another man, the degree of connection or tendency may vary by delicate shades. If the buyer knows that the sale is made only for the purpose of facilitating his illegal conduct, the connec-

tion is at the strongest. If the sale is made with the desire to help him to his end, although primarily made for money, the seller cannot complain if the illegal consequence is attributed to him. If the buyer knows that the seller, while aware of his intent, is indifferent to it or disapproves of it, it may be doubtful whether the connection is sufficient. Compare Com. v. Churchill, 136 Mass. 148, 150. It appears to us not unreasonable to draw the line as it was drawn in Webster v. Munger, and to say that when the illegal intent of the buyer is not only known to the seller, but encouraged by the sale as just explained, the sale is void. The accomplice is none the less an accomplice that he is paid for his act. See Com. v. Harrington, 3 Pick. 26.

The ground of the decision in Webster v. Munger is that contracts like the present are void. If the contract had been valid, it would have been enforced. Dater v. Earl, 3 Gray, 482. As we have said or implied already, no distinction can be admitted based on the fact that the law to be violated in that case was the *lex fori*. For if such a distinction is ever sound, and again if the same principles are not always to be applied whether the law to be violated is that of the State of the contract or of another (see Tracy v. Talmage, 14 N. Y. 162, 213), at least the right to contract with a view to a breach of the laws of another State of this Union ought not to be recognized as against a statute passed to carry out fundamental beliefs about right and wrong shared by a large part of our own citizens. Territt v. Bartlett, 21 Vt. 184, 188, 189. In the opinion of a majority of the court, this case is governed by Webster v. Munger, and we believe that it would have been decided as we decide it if the action had been brought in Maine instead of here. Banchor v. Mansel, 47 Me. 58.

BREACH OF MARRIAGE PROMISE—IMMORAL CONSIDERATION.—It is not every breach of the contract of marriage which subjects the offending party to an action for damages, as Saxon v. Wood, 30 N. E. Rep. 797, will show. In that case the complaint alleged that defendant, who was a suitor of plaintiff, an unmarried woman, solicited her to have sexual intercourse with him, and on her refusal, agreed that if she should yield to his wishes and thereby become pregnant, he would at once marry her; that in consideration of such agreement, to which she assented, plaintiff yielded to defendant's solicitations and did have sexual intercourse with defendant, from which pregnancy resulted, and from which a child was born to plaintiff; and that defendant, on her request to fulfill his agreement, refused to marry her. It was held that the action would not lie, the contract being based on an immoral consideration. The court distinguished Kurtz v. Frank, 76 Ind. 594; Wilson v. Ensworth, 85 Ind. 399, and Kenyon v. People, 26 N. Y. 203. Block, J., says, *inter alia:*

In an action for a breach of a promise to marry, a consideration for the promise must be shown. There must have been mutual promises to marry. Unless there has been a promise on the part of the plaintiff, the promise of the defendant is void for want of consideration. Adams v. Byerly, 123 Ind. 368, 24 N. E. Rep. 130. In the case before us the agreement of the parties did not consist merely of mutual promises to marry. The promise and agreement to which it was alleged the appellee assented was to marry in case of pregnancy resulting from her future intercourse with the appellant. It is alleged that he solicited her, not to marry him, but to have sexual intercourse with him, and offered marriage as a consideration for such intercourse and consequent pregnancy. Her acceptance of his offer implied her agreement to m arry if their intercourse should result in her pregnancy. The consideration of his promise to marry was alleged to be that she should have sexual intercourse with him, and should thereby become pregnant. The marriage which they agreed about was not to take place until she should have so paid for it. A woman cannot maintain an action for her own seduction, when the yielding of her person has been induced by the promise of a pecuniary reward (Wilson v. Ensworth, 85 Ind. 339); but she may maintain such an action where she has been prevailed upon to surrender her chastity under the promise of the seducer to marry her. Lee v. Hefley, 21 Ind. 98; Shewalter v. Bergman, 123 Ind. 155, 23 N. E. Rep. 686, and cases cited. Her action for seduction is an action of tort provided by statute, whereby she obtains damages for the defendant's wrong, notwithstanding her consent to the act which injures her. An action for a breach of promise to marry is a common-law action founded upon a contract. An action will not lie for the breach of a contract based upon an illegal or immoral consideration. In 2 Kent, Comm. 466, it is said: "The consideration must not only be valuable, but it must be a lawful consideration, and not repugnant to law or sound policy or good morals, *ex turpi contractu actio non oritur* and no person, even so far back as the feudal ages, was permitted by law to stipulate for iniquity. . . . If the contract grows immediately out of, or is connected with, an illegal or immoral act, a court of justice will not enforce it." See, also, 2 Chit. Cont. (11 Amer. Ed.) 979; 1 Pars. Cont. 456; Bish. Cont. § 494; 1 Whart. Cont. §§ 370-373. The validity of a man's promise to marry a woman is dependent upon the consideration existing for such promise. Felger v. Etzell, 75 Ind. 417-419. In Hanks v. Naglee, 54 Cal. 51, which was an action for a breach of promise to marry, the plaintiff testified, in substance, that the agreement between the parties was that the plaintiff should then presently surrender her person to the defendant, and that in consideration of such surrender the defendant would afterwards marry her. It was held that, upon well-settled principles, the plaintiff could not recover upon such a contract that being a contract for illicit cohabitation, it was tainted with immorality. See, also, Boigneres v. Boulon, 54 Cal. 146; Baldy v. Stratton, 11 Pa. St. 316; Goodal v. Thurman, 1 Head, 208; Steinfield v. Levy, 16 Abb. Pr. (N. S.) 26. If it be said that the complaint showed by implication a promise of the appellee to marry the appellant, yet she is not shown to have made any promise which could serve as a consideration for his promise. Her implied promise was so united with the immoral part of the consideration, and so dependent upon the consequences of the immoral conduct proposed that it cannot be separated and made to serve as a valid consideration. Steinfield v. Levy, *supra;* James v. Jellison, 94 Ind. 292; Lodge v. Crary, 98 Ind. 258; Ricketts

v. Harvey, 106 Ind. 564, 6 N. E. Rep. 325. The appellee relies in argument upon Kurtz v. Frank, 76 Ind. 594; Wilson v. Ensworth, 85 Ind. 399; and Kenyon v. People, 26 N. Y. 203. Kurtz v. Frank, *supra*, was an action for breach of marriage contract. The questions presented on appeal arose upon a motion for a new trial. It is said in the opinion of the court: "the plaintiff testified that the defendant promised to marry her in September or October (1878); that he said he would marry her in the fall, if they could agree and get along and be true to each other; but, if she became pregnant from their intercourse, he would marry her immediately. She did become pregnant about the middle of July, 1878, and informed the defendant of the fact as soon as aware of it. Upon this evidence it is insisted that the agreement to marry immediately, in case of the plaintiff's pregnancy, is void, because immoral, and that, aside from this part of the agreement, the defendant had until the 1st of December within which to fulfill his engagement, and consequently that the suit, begun as it was before that date, was prematurely brought. It does not appear that the illicit intercourse entered into the consideration of the marriage contract, but the appellant, having agreed to marry the appellee at a time then in the future, obtained the intercourse upon an assurance that, if pregnancy resulted, the contract already made should be performed at once. This did not supersede the original agreement, but fixed the time of its performance. Clark v. Pendleton, 20 Conn. 495. We are not prepared to lend judicial sanction and protection to the seducer by declaring that he may escape the obligation of his contract, so made on the plea that it is immoral. But if this were otherwise, and if, by its terms, the contract was not to be performed until at a time subsequent to the commencement of the suit, yet if, before the suit was brought, the appellant had renounced the contract, and declared his purpose not to keep it, that constituted a breach for which the appellee had an immediate right of action."

SUIT IN EQUITY TO ENJOIN VOID JUDGMENT, ASSESSMENT OR TAX.

Will a suit in equity to restrain a void judgment be sustained?

What is a Void Judgment?—The first question to be determined is, What is a void judgment? A void judgment is one pronounced by a court which did not have jurisdiction over the subject-matter of the action, or over the person of the defendant therein, and where such want of jurisdiction is apparent upon the face of the record.[1] Second. What is the effect of a void judgment? "A void judgment is in legal effect no judgment. By it no rights are divested; from it no rights can be obtained. Being worthless in itself, all proceedings founded upon it are equally worthless. It neither binds nor bars any one. All acts performed under it, and all claims flowing out of it are void. The parties attempting to enforce it may be responsible as trespassers. The purchaser at a sale by virtue of its authority finds himself without title and without redress."[2] "As to the person against whom it professes to be rendered, it binds him in no degree whatever, it has no effect as a lien upon his property, it does not raise an estoppel against him. * * * It is not necessary to take any steps to have it reversed, vacated or set aside. But whenever it is brought up against the party he may assail its pretensions and show its worthlessness. It is supported by no presumptions and may be impeached in any action, direct or collateral."[3]

If these views be correct, a void judgment is an absolute nullity, it has no legal existence whatever; and certainly a court would not attempt to enjoin that which has no existence, which creates no rights and can give rise to no liabilities. The general rule is that a court of equity will enjoin the enforcement of a judgment only on the ground that it is unjust, unconscionable and creates a cloud on title; but a void judgment, one which would make a person attempting to enforce it a trespasser, cannot create a cloud upon title. If anything which has material substance pass between the sun and the earth it casts a shadow; but a nullity, a nonentity cannot cast a shadow, nor can it create a cloud. Black, in his work on Judgments,[4] says: "But if it (the judgment) is void for want of jurisdiction the vendee takes no title whatever, and the sheriff's deed does not even create a cloud on the title which a court of equity can remove."

In a Wisconsin case it is said: "It is well settled by the decisions of this court that a court of equity will not set aside a judgment rendered in an action at law, merely because it may be void for want of jurisdiction of the court rendering the same, or for irregularities which render it void. Where a court of equity proceeds to set aside a judgment at law it proceeds upon equitable considerations only. If the judgment rendered is not inequitable as between the parties, no matter how irregular or void the same may be, a

[1] 1 Freeman on Judgments, § 116; 1 Black on Judgments, § 218.

[2] Freeman on Judgments, § 117.

[3] 1 Black on Judgments, § 170.

[4] Vol. 1, § 218, citing Bowers v. Chaney, 21 Tex. 363, and Holland v. Johnson, 80 Mo. 34.

court of equity will not interfere, but will leave the defendant to such remedies as a court of law can give him to avoid the effects thereof:"[5] and such seems to be the unquestionable tendency of judicial decisions in this country.[6]

Merits Must be Shown.—It is generally held that, where a judgment at law is void for want of jurisdiction, no summons or notice having been served on the defendant, nor opportunity given him for defense, nor any appearance entered by or for him, equity will relieve against the judgment if it be shown that there is a meritorious defense to the action.[7] And Mr. Freeman says: "But the better established rule undoubtedly is that, notwithstanding an alleged want of service of process, a court of equity will not interfere to set aside a judgment until it appears that the result will be other or different from that already reached."[8] It is not clearly apparent what object could be accomplished or what benefit could, by any possibility, accrue to the defendant by setting aside a judgment when the defendant therein had no defense to the claim on which the judgment had been obtained. He could make no defense. He could not defeat a judgment in any proceeding to which he was properly made a party; and if a court of equity should set aside the judgment rendered by the court of law and permit the defendant to appear and defend, the result would simply be that the court of law would again render judgment in favor of the plaintiff and against the defendant. It would amount to a stay of proceedings and nothing more. Therefore, if the defendant in such judgment desire an injunction and relief against the same, he must allege and prove that he has a good defense on the merits.[9] Yet the Supreme Court of the State of Oregon, in an opinion rendered by Strahan, C. J., in a case where it was sought to enjoin an execution based on a judgment rendered by a justice of the peace in action brought in his court, but in which no summons had been served on the defendant, and when the complaint in equity did not allege or claim any defense to the action at law, enjoined the execution on the grounds that the judgment of the justice (a paper purporting to be a transcript of the judgment having been filed in the office of the county clerk, and the execution having been issued out of the circuit court), was a lien on the real estate of the defendant and constituted a cloud on defendant's title thereto, although said judgment was void.[10] But the question whether or not a court of equity would enjoin a void judgment where there was no meritorious defense to such judgment, was not raised in the argument, nor was it considered by the court; and, without discussing the question, the court seems to have taken it for granted that a void judgment would create a cloud on title, and that, therefore, a court of equity would enjoin its collection; while in California it was held that "to constitute a cloud upon title such as warrants the interference of a court of equity, it is necessary to show by proof of extrinsic facts the invalidity of proceedings apparently valid on their face."[11]

Void Taxes and Assessments. — The same rule prevails in equity with reference to injunctions against taxes and assessments for improvements where the invalidity is apparent on the face of

[5] Thomas v. West, 59 Wis. 103, s. c., 17 N. W. Rep. 604 and cases there cited. See also Wilkinson v. Rewey, 59 Wis. 556, s. c., 18 N. W. Rep. 513.

[6] Railroad Company v. Reynolds, 89 Mo. 196, s. c., 1 S. W. Rep. 298; 1 High on Injunctions, § 125; Murphy v. Wilmington, 11 Cent. L. J. 430; Sanches v. Camajo, 31 Cal. 170; Ewing v. St. Louis, 5 Wall. 413; Dows v. Chicago, 11 Wall. 108; Luce v. Brown, 14 Pac. Rep. 366, s. c., 73 Cal. 3; Ede v. Hazen, 61 Cal. 360; Partin v. Luterbah, 6 Jones Eq. 34; Farris v. Hayes, 9 Oreg. 81-84; Murphree v. Bishop, 79 Ala. 404; Williams v. Hitzie, 83 Ind. 303, 10 Am. & Eng. Ency. of Law, 885, 887, 898.

[7] 1 Black on Judgments, §§176, and authorities there cited in note 137.

[8] Freeman on Judgments, § 498.

[9] 1 High on Injunctions, §§ 113, 114, 125, 126, 132; Winters v. Mears, 41 N. W. Rep. 157; Rotan's Heirs v. Springer, 12 S. W. Rep. 156; State v. Hill, 8 S. W. Rep. 401; Hanna v. Morrow, 43 Ark. 107; Lininger v. Glenn, 49 N. W. Rep. 1128; Harnish v. Beamer, 11 Pac. Rep. 888; Gregory v. Ford, 14 Cal. 139, s. c., 73 Am. Dec. 639; Fowler v. Lee, 32 Am. Dec. 176; Piggett v. Addicks, 56 Am. Dec. 547; O., R. & N. Co. v. Cates, 10 Oreg. 578 and cases cited; Sharp v. Schmidt, 62 Texas, 263; Gifford v. Morrison, 41 Am. Rep. 538; Wilson v. Auburn, 43 N. W. Rep. 257; Warden v. Supervisors, 14 Wis. 618; Douglass v. Harrisville, 27 Am. Rep. 551; Kanswirth v. Sullivan, 9 Pac. Rep. 805.

[10] White v. Espey, 28 Pac. Rep. 71.

[11] Roman Catholic Archbishop v. Shipman, 11 Pac. Rep. 345, 69 Cal. 586, citing Scribner v. Allen, 12 Minn. 148, where it is said: "The invalidity of the proceedings being patent on their face, they cannot be a cloud on plaintiff's title."

the proceedings. Mr. High,[12] in his valuable work on this subject, says: "It is to be observed, however, that where the relief is sought to prevent a cloud upon title it will only be granted in those cases where the illegality or irregularity complained of exists *dehors* the record. And where the objection to the validity of the tax or assessment appears on the face of the tax proceedings, or upon the face of the proceedings by which alone the adverse party can claim title to the land sold for the unpaid tax, equity will not enjoin."[13]

Where Judgment is Valid on its Face, but its Invalidity is Shown by Matter Dehors the Record.—"A judgment, regular on its face, will not be enjoined when it is not shown to be unjust or oppressive, and when it does not appear that the person asking the aid of equity against the enforcement of the judgment has a good defense to the claim upon which it is founded."[14] In cases of this character the judgment would, undoubtedly, cast a cloud on the title to the real property owned by the defendant; but what beneficial result could be obtained by vacating the judgment and enjoining the enforcement thereof by a suit in equity, in order that the complaining party might be permitted to defend in a court of law, when the claim of the plaintiff was just, and the defendant in the court of law had no *bona fide* valid defense thereto, passes my power of comprehension. If the complainant would pay the debt which he justly owed the judgment would be satisfied and the cloud would be lifted. Before he would be entitled to an injunction he certainly ought to be required to show that "the judgment was wrong, that he did not owe the debt for which it was rendered, or that he had offered to pay it. * * * He must do equity upon the condition which he asks equity."[15] Courts of equity "interfere only to prevent injustice. And if a party can say nothing against the justice of a judgment, can give no reason why in equity he ought not to pay it, a court of equity will not interfere, but will leave him to contend against it at law in the best way he can."[16] Yet in a case where husband and wife executed a mortgage to secure a note given by the husband only, and for a year before the commencement of the action to foreclose the mortgage the husband had been absent from home—a fugitive from justice—service of notice was made on him by leaving a copy with with the wife, and notice was also served on the wife, but no personal judgment was asked against the wife, but a default was entered as to both, and a personal judgment was rendered against the wife. Afterwards, in an action by the wife to enjoin an execution and to vacate the judgment, the district court held that the personal judgment against the wife was void, but denied her any further relief; the wife appealed, and the supreme court affirmed that portion of the decree which held the personal judgment against her void, but reversed that portion which refused her any further relief.[17] The exact grounds upon which the court reached this conclusion are not altogether apparent. The decree as to the wife, while erroneous, was certainly not void, for the court had jurisdiction of the subject-matter of the action and of her personally. The decree as to the husband was valid on the face of the record, because, so far as anything there appeared, service had been legally made on him. Could any one except the husband complain that, as a matter of fact, the court had not obtained jurisdiction of his person? And, if the wife and husband, or either of them, could complain, why should the decree be vacated, unless it was inequitable and unjust, and there was a valid defense to the action to foreclose the mortgage which they had been prevented from making without any fault on the part of them or either of them? So far as the opinion shows, it was not claimed that there was any defense whatever;

[12] 1 High on Injunctions, § 525.

[13] Douglass v. Town of Harrisville, 9 W. Va. 162, s. c., 27 Am. Rep. 548; Murphy v. Wilmington, 11 Cent. L. J. 430, s. c., 6 Houst. 108, 22 Am. St. Rep. 345; Holland v. Mayor, etc. of Baltimore, 11 Md. 186, s. c., 69 Am. Dec. 195 and note 199; Heywood v. City of Buffalo, 14 N. Y. 539; Ewing v. St. Louis, 5 Wall. 413; Dows v. Chicago, 11 Wall. 108; Hannewinkle v. Georgetown, 15 Wall. 548; Michael v. City of St. Louis, 18 S. W. Rep. 967.

[14] 1 High on Injunctions, § 126 and authorities cited; 1 Black on Judgments, § 377; Freeman on Judgments, § 498.

[15] Williams v. Hitzie, 83 Ind. 303, 309.

[16] Stokes v. Narr, 11 Wis. 407. Where the judgment is regular on its face it will not be enjoined unless the defendant against whom it is rendered has a valid defense which he was prevented from making by reason of fraud, accident or circumstances beyond his control. Petelka v. Fitle, 51 N. W. Rep. 131.

[17] Wolf v. Shenandoah Nat. Bank, 50 N. W. Rep 561.

and while this was legal victory, yet it was barren of any beneficial results except such as were temporary only.

Assessments and Taxation Again.—Again, in the matter of assessments levied by municipal corporations for improvements of streets and sidewalks, the party complaining must pay the amount of tax admittted to be due, or the amount of the assessment to the extent to which his property has been benefitted by such improvement, before he will be entitled to be heard in a court of equity; in other words, he must come into court and offer to do equity before he will be entitled to equitable relief. In the case of the City of Evansville v. Pfisterer,[18] the court say: "The first rule of equity is, that he who seeks equity must do equity; and he who was benefited by the work should have tendered the value of the improvement to the contractor before he brought a suit to enjoin the payment of the whole expense of the work. There is no equity in the complaint, and no right is shown to have an injunction.[19] And in such cases the party who makes the complaint must apply to the courts as soon as the facts come to his knowledge, showing that a tax about to be levied, or an assessment for an improvement about to be made is illegal. He must not sleep on his rights; he cannot lie quietly by and knowingly let work be done for which a tax will be levied or an assessment made, and after the work is completed and his property thereby improved, come into a court of equity and obtain relief against the tax or assessment because the same is illegal or void. He is estopped by his negligence and laches. "The fact that a street is being improved by public officers ought to put the owner on inquiry, and to him should be applied the familiar rule that one put upon inquiry is chargeable with notice of all the facts which a reasonably diligent investigation will disclose. Public works are undertaken, as every one knows, under authority delegated by law to the public officers, and there is little or no reason why a particular owner, who has full notice of what is being done, should be allowed to stand by in silence until the work is completed, and then escape paying for the benefit his property has received. If he would avoid this result he should act promptly, and if he fails he should not demand that the persons who have done the work should go unpaid."[20] The case of Tash v. Adams, Treasurer,[21] was a proceeding instituted to enjoin the collection of certain taxes that had been voted by Natick, and the injunction was refused upon the ground that the petitioners had been guilty of laches and unreasonable delay in the enforcement of their rights. The court say: "Upon these facts we think it clear that the petitioners are not in equity entitled to the relief which they seek. So far as relates to this vote and appropriation by the town, assuming that the purpose for which the money was appropriated was illegal (upon which question we express no opinion), nevertheless, the petitioners fail to make out a case entitling them to the interposition of this court. It is a well settled rule in equity that if a party is guilty of laches or unreasonable delay in the enforcement of his rights, he thereby forfeits his claim to equitable relief. This rule is more especially applicable to cases where a party, being cognizant of his rights, does not take those steps to assert them which are open to him, but lies by and suffers other parties to incur expenses and enter into engagements and contracts of a burdensome character.[22] This seems to me to be a very salutary rule, and one which should be adhered to and applied in all cases when the facts will justify, as otherwise great and irremedial injury might result. It would certainly be inequitable and unjust to allow one to sleep on his right, with full knowledge of all that was being done, and that his property was being improved and benefited, and then, after the improvement was completed and his property benefited thereby, and expense had been incurred which must necessarily be met and paid from some source or other, to come into a court of equity and

[18] 34 Ind. 36, 7 Am. Rep. 214.

[19] See also Parker v. Omaha, 20 N. W. Rep. 382; Appeal of Pittsburgh, 12 Atl. Rep. 366; Elliott on Roads and Streets, 420; Ritchie v. South Topeka, 38 Kan. 368, 374; Peters v. Griffee, 8 N. E. Rep. 727; Lewis on Eminent Domain, p. 491, § 379; 1 High on Injunctions, § 138.

[20] Elliott on Roads and Streets, 420, 421.

[21] 10 Cush. 252.

[22] See also Lafayette v. Fowler, 34 Ind. 140; Sleeper v. Bullen, 6 Kan. 300; Jackson v. Dyer, 3 N. E. Rep. 863; Pickering v. State, 6 N. E. Rep. 611; Peters v. Griffee, 8 N. E. Rep. 727; Montgomery v. Wasem, 19 N. E. Rep. 184.

say: "It is true I knew all that was going on, that my property was being benefited by the improvement being made, that I made no objection whatever, that I am willing to accept all benefits conferred, but am not willing to pay therefor, because, forsooth, the proceedings under which improvements were made were not strictly legal, and the public officers did not follow and strictly comply with the law authorizing such improvements to be made; therefore I ask the court, as a matter of equity and justice, to relieve me from the payment of the whole and every part of the assessment levied on my said property." The court, in Wright v. City of Tacoma,[23] said: "After the city had entered into contract, the work would be done at all events, and at the expense of all tax payers within the city, if not done under these proceedings. Thus appellant, by remaining silent when good faith would require him to speak, would gain the advantage of having his street improved at the expense of others. This would be a moral fraud. A court of equity will not assist in the perpetration of this fraud, but will leave him to pursue his remedy at law, if he has any." Yet in Steckert v. City of East Saginaw,[24] it was held that knowledge, presumptive or actual, of the progress of a work of public improvement in a city will not estop a party from complaining of illegalities in the proceeding by which the work was authorized; and in Longworthy v. City of Dubuque,[25] it was held that mere submission on the part of a citizen to an illegal levy of taxes will not, except in extreme cases, be construed into a recognition of the right to the extent of subsequently estopping him from denying it.

Again, equity will not interfere where the complaining party has a plain, speedy and adequate remedy at law. In cases of this character he has such remedy by writ of review or by *certiorari*,[26] or by paying the amount of the tax or assessment under protest, and then commencing an action at law to recover the same.[27] Under these circumstances we can see no good and sufficient reason why a court of equity should be called upon to restrain by injunction any of these proceedings. D. R. N. BLACKBURN.

[23] 19 Pac. Rep. 45.
[24] 22 Mich. 104.
[25] 13 Iowa, 86.
[26] Murphy v. Wilmington, 11 Cent. L. J. 427; Ewing v. St. Louis, 5 Wall. 413; 2 Dillon on Municipal Corporations, §§ 936, 973; 1 High on Injunctions, §§ 125, 491; West v. Ballard, 32 Wis. 168; Lance v. McCoy, 12 S. E. Rep. 728; K. & O. R. Co. v. Ryan, 6 *Id.* 924; Loenitz v. Seeligger, 26 N. E. Rep. 887; Blake v. Brooklyn, 26 Barb. 101; Haywood v. Buffalo, 14 N. Y. 34-9.
[27] Murphy v. Wilmington, 11 Cent. L. J. 431; Loud v. Charlestown, 99 Mass. 208; Hunnewell v. Boston, 106 Mass. 352; 2 Dillon on Municipal Corporations, § 973.

CARRIERS OF FREIGHT—DISCRIMINATION—COMMON LAW LIABILITY.

COWDEN V. PACIFIC COAST S. S. CO.

Supreme Court of California, May 6, 1892.

At common law an action will lie against a common carrier for an unreasonable and excessive freight charge, but not for a mere discrimination in favor of another shipper.

GAROUTTE, J.: This is an action brought by plaintiff to recover damages of defendant for a discrimination in freight rates. A demurrer to the complaint was interposed upon the ground that the court had no jurisdiction of the subject-matter of the action, and that no cause of action was stated. The demurrer was sustained, and the ruling of the court in this regard is the only matter before us for review.

The complaint substantially alleges that the defendant is a common carrier of freight, by vessel, between San Francisco and San Diego, *via* the Pacific ocean; that between certain dates plaintiff, as a merchant of San Diego, paid to defendant, according to its regular schedule of rates, large sums of money as charges for freight; that defendant charged a second merchant 12½ per cent. less for freight of the same character and quantity than it did plaintiff; that said charges were a discrimination against plaintiff, and, though often requested so to do, defendant refused to allow plaintiff such reduced rates, whereby he has been damaged in the sum of $1,674.14. The amount sought to be recovered as damages is the difference between the freight charges made to plaintiff and those made to the more favored merchant. It would seem to be entirely immaterial, to the extent, at least, of the consideration of the merits of this appeal, whether the present action is one of contract or of tort. From either standpoint it arises from a maritime contract solely, and courts of admiralty alone have jurisdiction, unless the cause comes within the reservation found in section 711 of the Revised Statutes of the United States: "The jurisdiction vested in the courts of the United States, in the cases and proceedings hereafter mentioned, shall be exclusive of the courts of the several States; * * * (3) Of all civil cases of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a com-

mon-law remedy, where the common law is competent to give it." There can be no question but that the voyage of a carrier made upon the high seas, even though the ports of departure and destination are in the same State, is under the exclusive control and regulation of congress. It is only the internal commerce and navigation of a State that is under the control and regulation of the State. As was said in Carpenter v. The Emma Johnson, 1 Cliff. 638: "Great mischief would inevitably result from any rule denying admiralty jurisdiction in all cases where the place of the departure of the vessel and the place of her destination are both within the same State, when any part of the voyage is upon the high seas, for every navigator knows that in many such cases nearly the whole voyage is out of the limits of the State." See Lord v. Steamship Co., 102 U. S. 544; Pacific Coast Steamship Co. v. Board of Railroad Com'rs., 18 Fed. Rep. 10.

It follows from the foregoing authorities that plaintiff has no standing in the courts of this State, unless his rights are reserved to him under the reservation of the Revised Statutes previously quoted. In other words, has he a cause of action at common law against the defendant, under the facts of his complaint? The gist of the complaint is that for the same quantity and character of freight plaintiff was charged a sum 12½ per cent. greater for transportation from the same point than the other merchant. Respondent insists that at common law the right of action was based upon the rate charged being unreasonable and excessive in itself, and that a mere discrimination, as disclosed in this case, gave no cause of action; that no wrong was committed if the charge was reasonable for the service, and, there being no wrong, no remedy was demanded. Appellant insists that at common law it is the duty of the carrier to "receive and carry goods for all persons alike, and that the rates must not only be reasonable, but equal, when the conditions are substantially the same." It will thus be seen that the merits of this appeal will be concluded by a determination as to what is the common law upon this question; and that is a matter of some difficulty of solution, owing to the divergent views expressed upon the subject by the various courts of this country. This divergence of opinion among the courts has undoubtedly been caused to some extent by the fact that for more than 50 years the courts of England have had no occasion to expound the common law upon this subject; common carriers, especially railway companies, having been placed entirely under the control of the statute law. In this country, to some extent, there is a lack of direct authority upon the question, owing to the fact that constitutional and legislative provisions are common in nearly all the States of this Union, prohibiting common carriers from practicing discrimination in their rates of toll. And, while these statutory and constitutional provisions have been regarded and incidentally declared to be reiterations of the common law by many courts of this country, sound authority upon which to base such declarations is wanting in the books. The fundamental and statute law of the various States upon this subject appears to have been founded upon the principles embodied in the early acts of parliament pertaining to the conduct and control of railways as common carriers, rather than upon the common law of England. Indeed, we have been able to obtain but few direct adjudications from English courts upon this question, owing to the fact that it would seem the business of inland common carriers in that country was not a matter of great concern until railroads were operated; and immediately subsequent to that great epoch in the world's progress, statutory enactments followed, entirely taking away from the courts the necessity of any further application of the common-law rights and remedies. If the common law were as appellant here contends it to be, there would have been no necessity for parliament to have enacted these stringent "equality clauses," as they were termed. It appears that this principle of equality of charges arose from the necessity of the times, a necessity created by the operation of railroads, which swallowed up and destroyed all other common carrier systems of England, and thereby created a monopoly of the business, and a power for wrong that at once demanded the restrictions of legislative enactments. This conclusion is fully borne out by the language of Mr. Justice Blackburn in Railway Co. v. Sutton, L. R. 4 H. L. 238, wherein he said: "I think it appears from the preamble of the 90th section of the railway clauses consolidation act (1845) that the legislature was of opinion that the changed state of things arising from the general use of railways made it expedient to impose an obligation on railway companies acting as carriers beyond what is imposed on a carrier at common law. And, if this be borne in mind, I think the construction of the proviso for equality is clear, and is that the defendants may, subject to the limitations in their special acts, charge what they think fit, but not more to one person than they, during the same time, charge to others under the same circumstances. And I think it follows from this that if the defendants do charge more to one person than they, during the same time, charge to others, the charge is, by virtue of the statute, extortionate. And I think the rights and remedies of a person made to pay a charge beyond the limit of equality imposed by the statute on railway companies, acting as carriers, on their line, must be precisely the same as those of a person made to pay a charge beyond the limit imposed by the common law on ordinary carriers as being more than was reasonable. The mode of establishing that the demand is extortionate differs in the two cases. Where it is sought to prove that the charge is unreasonable, and therefore extortionate, the fact that another was charged less is only material as evidence for the jury tending to prove that the reasonable charge was

the smaller one. When it is sought to show that the charge is extortionate, as being contrary to the statutable obligation to charge equally. it is immaterial whether the charge is reasonable or not; it is enough to show that the company carried for some other person or class of persons at a lower charge during the period throughout which the party complaining was charged more under the like circumstances."

It is not the purpose of the court to review the authorities of this country upon the question under discussion. For the reasons previously suggested, the matter was indirectly involved in the great majority of them, and, as authority upon the subject, they are weakened to that extent. The case of Scofield v. Railway Co., 43 Ohio St. 571, 3 N. E. Rep. 907, is the leading case in the United States supporting appellant's contention, and it is upon this case that appellant says "he has pinned his faith and hung his hope." The case of Johnson v. Railroad Co., 16 Fla. 623, is the leading case in this country holding to the contrary view, and the opinion of the learned judge in the Scofield Case does not appear to overrule the doctrine there declared, but would seem to look to the statute law of Ohio for support, rather than to the common law. It says, in speaking of the Florida case: "Reliance is placed on the doctrine that discrimination is not necessarily unlawful, and that all the freighter is entitled to is a reasonable rate, not necessarily equal to all, and, in the absence of any statute to the contrary, we are not inclined to question the correctness of these decisions." The facts in the Florida case appear to be practically identical with the facts of this case. Florida had no statutory law upon the subject of the regulation of common carriers, and hence, as here, the merits of the case rested upon the determination as to what was the common law upon the subject. In this case the ancient as well as the modern, authorities are ably reviewed, and the court says: "Our conclusions are that, as against a common or public carrier, every person has the same right; that in all cases, where his common duty controls, he cannot refuse A and accommodate B; that all, the entire public, have the right to the same carriage for a reasonable price, and at a reasonable charge for the service performed; that the commonness of the duty to carry for all does not involve a commonness or equality of compensation or charges; that all a shipper can ask of a common carrier is that for the service performed he shall charge no more than a reasonable sum to him; that whether the carrier charges the other more or less than the price charged a particular individual may be a matter of evidence in determining whether a charge is too much or too little for the service performed; and that the difference between the charges cannot be the measure of damages in any case, unless it is established by proof that the smaller charge is the true, reasonable charge, in view of the transportation furnished, and that the higher charge is excessive to that degree." The court also says: "In the last edition of Story on Bailments we find the rule of the common law thus stated: 'At common law a common carrier of goods is not under any obligation to treat all customers equally. He is bound to accept and carry for all upon being paid a reasonable compensation. But the fact that he charges less for one than for another is only evidence to show that a particular charge is unreasonable—nothing more. There is nothing in the common law to hinder a carrier from carrying for favored individuals at any unreasonably low rate, or even gratis.' "

By reason of the variance which exists in the views of the courts of this country as to what is the common law upon this subject, it would seem that the adjudications of the common-law courts of England upon such a matter should have preeminent and controlling weight with the courts of the various States. In the case of Railroad Co. v. Sutton, to which reference has already been made, Mr. Justice Blackburn, in a very luminous opinion, addressed in part directly to this question, said: "At common law a person holding himself out as a common carrier of goods was not under any obligation to treat all customers equally. The obligation which the common law imposed upon him was to accept and carry all goods delivered to him for carriage according to his profession (unless he had some reasonable excuse for not doing so), on being paid a reasonable compensation for so doing; and, if the carrier refused to accept such goods, an action lay against him for so refusing; and if the customer, in order to induce the carrier to perform the duty, paid, under protest, a larger sum than was reasonable, he might recover back the surplus beyond what the carrier was entitled to receive, in an action for money had and received, as being money extorted from him. But the fact that the carrier charged others less, though it was evidence to show that the charge was unreasonable, was no more than evidence tending that way. There was nothing in the common law to hinder a carrier from carrying for favored individuals at an unreasonably low rate, or even gratis. All that the law required was that he should not charge any more than was reasonable." The learned justice in his opinion clearly indicates that the prime object of the railway equality clauses enacted by parliament was to cover the exact case of injury by discrimination in freights, such as is claimed by plaintiff in this record. During the progress of the argument in Baxendale v. Railway Co., 4 C. B. (N. S.) 78, Justice Byles said: "I know no common-law reason why a carrier may not charge less than what is reasonable to one person, or even carry him free of all charge." For the foregoing reasons the court concludes that the complaint is deficient in not stating that the charge to plaintiff was unreasonable; and that the allegation of discrimination or inequality is not the equivalent of an allegation of an excessive charge. Let the judgment be affirmed.

XUM

NOTE.—It is an undenied and undoubted principle of the common law governing common carriers, that the carrier must accept and carry the goods of all such persons as offer them for transportation, so long as he has means of conveyance. It readily follows from this, and is likewise undenied, that a common carrier cannot at common law demand an unreasonably large compensation for transporting the goods of any person, since this would amount to a virtual refusal to carry. The question, however, which was raised in the principal opinion, and which has been greatly discussed and differently determined by the courts, is whether a common carrier can lawfully charge a sum not unreasonable in itself for the carriage of certain goods, and at the same time charge another person a less sum for carrying like goods a like distance under entirely similar circumstances. A number of cases hold that this is an injury at common law to the person charged the greater rate, and will be compensated in damages. Dinsmore v. Louisville, etc. R. Co., 2 Fed. Rep. 465; Hays v. Pa. R. Co., 12 Fed. Rep. 309; Southern Express Co. v. Memphis, etc. R. Co., 10 Fed. Rep. 210, s. c., 13 Cent. L. J. 68; Samuels v. L. & N. R. Co., 31 Fed. Rep. 57, in which case the court stated that it was not an action for unreasonable charges, but for discrimination, and then allowed recovery; Audenreid v. Phil. & Read. R. Co., 68 Pa. St. 370; Article, 20 Cent. L. J. 23; Southern Express Co. v. St. Louis, etc. R. Co., 14 Cent. L. J. 173, wherein is the opinion of Justice Miller in the Express Companies v. Railroad Companies—cases determined at St. Louis. The Supreme Court of Iowa and the United States circuit court of Pennsylvania hold that the amount of the discrimination is the measure of recovery. Hays v. Pa. R. Co., *supra;* Cook v. Chicago, R. I. & P. R. Co., 46 N. W. Rep. 1080, s. c., 9 L. R. A. 764. A contract by a carrier to carry goods for certain persons at a cheaper rate than it will carry under the same conditions for other parties is void, as it creates an illegal preference. Cases seeking to enforce such contracts: Messenger v. Pa. R. Co., 36 N. J. L. 407; Indianapolis, etc. R. Co. v. Ervin, 27 Am. & Eng. R. R. Cas. 8. On the other hand, it is held that an agreement to give a special rate, if shipper will give carrier all his freight, is not an unreasonable discrimination, if the shipper is not given an exclusive privilege. Bayles v. Kans. Pac. R. Co., 40 Am. & Eng. R. R. Cas. 42.

A number of cases hold that an unjust, unreasonable or injurious discrimination is against the common law. Atchison, T. & S. F. R. Co. v. D. & N. O. R. Co., 110 U. S. 667; Ragen v. Aiken, 77 Tenn. 609, or 9 Lea, 609; Chicago & N. W. R. Co. v. The People, 56 Ill. 365; Cleveland, etc. R. Co. v. Closser, 45 Am. & Eng. R. R. Cas. 275; McDuffe v. Portland, etc. R. Co., 52 N. H. 430, s. c., 13 Am. Rep. 72. This last case holds that an action will lie in one State for discrimination practiced in another against the laws thereof. Another class of cases, very like these, hold that the common law prohibits discriminations that will tend to injure or interfere with one's business, or build up monopoly and create oppression. Schofield v. R. Co., 43 Ohio St. 571; Vincent v. Chicago & Alton R. Co., 49 Ill. 33, 43; New England Express Co. v. Maine Cent. R. Co., 57 Me. 188, 196; Sanford v. R. Co., 24 Pa. St. 378; State v. Cincinnati, etc. R. Co., 42 Am. & Eng. R. R. Cas. 330. Most of the cases that hold that unjust discrimination is unlawful do so on the ground that railroads being allowed to take private property as for a public use, "exercise a sort of public office," and in it they must serve all alike. Chicago & N. W. R. Co. v. The People, *supra;* N. J. St. Nav. Co. v. Merchants' Bank, 6 How. 388; Sanford v. Ry. Co., *supra.* In Chicago, etc. R. Co. v. Parks, 18 Ill. 460, 464, it is held that a common carrier can favor an individual by giving him less than the usual rates, but cannot oppress one by charging him more than the usual rates.

Another class of cases following the remark of Justice Crompton in Garton v. B. & E. Railway Co., 1 Best & Smith 112, 153, that "the charging another person too little is not charging you too much," hold that discrimination is not unlawful. Fitchburg R. Co. v. Gage 12 Gray 393; Johnson v. Railroad Co., 16 Fla. 623, which holds that the difference in rates is only evidence to show unreasonable rate. It is held that discrimination may be made based on the quantities of goods sent by different shippers, but a higher rate cannot be charged because a shipper refuses to patronize carrier exclusively. Mancho v. Ward, 27 Fed. Rep. 529.

It is worthy of mention that the case of Great W. R. Co. v. Sutton cited in the principal opinion overrules the decision in Garton v. B. & E. R. Co., *supra*, that an action for money had and received could not be brought by the person discriminated against to recover the amount of a discrimination, when the discrimination was prohibited by statute. It may be added also that the question as regards the common law doctrine was not properly before the court in any of these English cases, as the then and still existing English statute prohibited discrimiuation.

The Supreme Court of Texas holds that both common law and statute prohibits discrimination only when unjust, and that whether unjust or not is a question for the jury. Houston, etc., R. Co. v. Rust, 9 Am. & Eng. R. R. Cas. 123.

The weight of authority seems to hold at least that an unjust, unreasonable or injurious discrimination, which would tend to injure the complainant's business or build up monopoly, is not allowed by the common law.

ROBERT W. DUNCAN.

St. Louis, Mo.

BOOK REVIEWS.

AMERICAN AND ENGLISH ENCYCLOPÆDIA OF LAW, Vol. 17.

Among the many valuable papers in this volume of the now well established series are those on Officers of Private Corporations, Parent and Child, Parol Evidence, Parties to Actions, Partition, which is extensively treated, and Partnership, the latter a law book in itself, occupying over five hundred pages.

We have heretofore and frequently called attention to the great value of this encyclopædia of law, being useful not only for ready reference, but as an accurate and exhaustive discussion of the authorities upon the elementary principles of law. We do not well see how the practitioner can afford to do without it.

BALLARD'S ANNUAL OF THE LAW OF REAL PROPERTY.

This volume represents a new undertaking, namely, the publication of an annual volume embracing the decisions of the different States on the law of real property. It seems to be a complete compendium of real estate law, embracing all the current cases of law carefully selected, thoroughly annotated and accurately epitomized, together with the statutory construction of the laws of the several States upon the subject of real estate. We have no doubt that the work, if properly prepared, will meet with a cordial support of real

estate practitioners. The present volume embraces some 900 pages containing the cases from all the courts of the United States on the subject of real estate law, many of the decisions being well annotated and interestingly discussed. The work is edited by T. E. and E. E. Ballard, well known as authors of some local Indiana and Kentucky works.

So far as we have been able to investigate, the book is well prepared and is deserving of praise. It is published by Ballard & Ballard, Crawfordsville, Ind.

RAY ON CONTRACTUAL LIMITATIONS.

This work is both opportune and of modern usefulness. It seems to enter a new field of jurisprudence, though the subject has been more or less covered by general treatises on constitutional law. It is a work upon the limitations of private contract which includes trade strikes, conspiracies, corporate trusts, and combinations. While the law recognizes that commercial property requires that every one of full age and reasonable discretion should have almost unlimited freedom in entering into contracts and that all engagements thus freely and fairly entered into should be held sacred and enforceable in law, and all equitable rights growing out of such engagements should be given full effect, yet there are limitations upon this right to contract which the security of society and the protection of individual rights render it imperative that the law making power should impose and that the courts should render effective. A concise statement of the table of contents will best reveal the scope and character of the work.

Chapter 1, Limitation upon the Right to Contract. Chapter 2, Contracts as Affected by Statute. Chapter 3, *Malum in Se* and *Malum Prohibitum*—Foreign Statute. Chapter 4, War as Affecting Contracts. Chapter 5, Private Contracts and Civil Governments. Chapter 6, When Courts will and When they will Not Relieve. Chapter 7, Contracts Affecting Marriage. Chapter 8, Contracts in Restraint of Trade. Chapter 9, Modification of the Rule as to Contracts in Restraint of Trade. Chapter 10, Monopoly. Chapter 11, Combinations to Monopolies. Chapter 12, Trade Trusts. Chapter 13, Conspiracy at Common Law.

It will be observed that under the above titles the author aims to treat of all the modern questions grouped around the subject of limitations upon private contracts and in the main we think that he has covered the subject. We look in vain for a discussion of the subject of the power of the legislature to abridge the right of contract between employer and employee, which is involved in the case of Haucock v. Yaden, 30 Cent. L. J. 192, 405, wherein the Supreme Court of Indiana, held constitutional, the weekly payment act of that State. We neither find the question discussed in this volume, nor do we find the above case cited which in our judgment is a serious omission. Neither do we find the case of State v. Goodwill, 30 Cent. L. J. 71, which involves the same question, nor is the more recent decision of Commonwealth v. Perry, 34 Cent. L. J. 78, decided by the Supreme Court of Massachusetts noted.

The author has also overlooked the very recent case of Frorer v. the People, wherein the Supreme Court of Illinois considered what is known as "weekly payment," "gross weight" and "truck store" acts, applicable to miners in that State. Godcharles v. Wigeman, wherein the Supreme Court of Pennsylvania declared void a law imposing limitations upon the right of contract between employer and employee, is also omitted from this volume. We are at loss to understand the occasion for these omissions as it certainly cannot be contended that the subjects discussed are not within the scope of this volume. The omission is the more serious by reason of the fact that the cases mentioned present perhaps the newest and freshest discussion of the main subject of the work. The reputation of the author of this work is of such character that we would not expect negligence or want of care in its preparation.

Notwithstanding this criticism, we have found the book as a rule accurate and well prepared. It is well printed, and with the exception of a want of system in the citation of cases, some being cited in the text, others in the notes, it presents a fine appearance. It is published by the Lawyers' Co-operative Publishing Company, Rochester, N. Y.

BOOKS RECEIVED.

Direct Legislation by the People. By Nathan Cree. Chicago: A. C. McClurg & Company. 1892.

The Elements of Criminal Law, Principles, Pleading and Procedure, for the Use of Law Schools and Students. By Irving Browne. Boston: The Boston Book Company. 1892.

An Introduction to the Study of the Constitution. A Study showing the play of Physical and Social Factors in the Creation of Institutional Law. By Morris M. Cohn, Attorney at Law. Baltimore: The Johns Hopkins Press. 1892.

The old English Manor, a Study in English Economic History. By Charles McLean Andrews, Ph.D. (J. H. U.), Associate in History in Bryn Mowr College. Baltimore: The Johns Hopkins Press. 1892.

A Treatise on the Law of Wills. By James Schouler, LL.D., Lecturer at Boston University Law School, and Author of Treatises on "Executors and Administrators," "Domestic Relations," etc. Second Edition. Boston: Boston Book Company. 1892.

Counter Negligence. A Treatise on the Law of Contributory Negligence or Negligence as a defense. By Charles Fisk Beach, Jr., of the New York Bar, Author of "Modern Equity Jurisprudence," "Private Corporations," "The Modern Law of Railways," "The Law of Receivers," "The Law of Wills," etc.; Editor of "The American Probate Reports," etc., and sometime Editor of "The Railway and Corporation Law Journal." Second Edition. New York: Baker, Voorhis & Company. 1892.

QUERIES ANSWERED.

Referring to question No. 5 (34 Cent. L. J. 260), and the answer at p. 329, I refer you to R. Wyatt, White v. Ellis, 65 L. T. R. (N. S.) 841, pp. 842, 843. According to the *obiter dictum* in that case, C would be subrogated to A to the extent of C's claim, and not exceeding A's. In this way B is not injured.

J. C.

HUMORS OF THE LAW.

SENTENCED BY SIGNS.—Once upon a time, says George R. B. Hayes, there was a judge named Redman, who presided over a big territory which kept him racing from Santa Cruz to Salinas and San Luis Obisbo. The Spanish population was the chief race to be found in that district, and Redman knew but two words in the language, which were "No tiende," and was put to the necessity of employing a court inter-

preter, who attended him in his rapid tour of the big circuit.

It happened that a murderer was to be sentenced in Monterey and that all important trial must be attended miles away on the same day. Redman's interpreter had gone off to a fandango in the wilds somewhere and couldn't be found when court was opened, and Redman was in a fury of impatience. At last, when he could endure the delay no longer, he said to the man below in the dock:

"Prisoner at the bar, stand up!"

"No tiende," said the man, shaking his head stupidly.

"You don't savey, do you?" exclaimed the judge sharply. "Well, do you understand this?" and he proceeded to gesticulate vigorously with his hands and indicate the motion of rising.

The man finally comprehended and arose stiffly in his seat.

"Prisoner at the bar, it is the sentence of this court that you be taken from the place whence you came on Friday, the 27th day of June next, be hanged by the neck until you are dead, and may God have mercy on your soul. Now, do you savey that?"

The poor prisoner shook his head in a bewildered fashion and could only cry, "No tiende, no tiende."

"Is there anybody present in this court who can translate that awful sentence to this prisoner?" demanded the judge of the half a dozen officials and spectators in the room. They were all in the same boat as the prisoner and could only shake their heads mournfully.

"Well," exclaimed the judge, a bright thought striking him, "I'll just show you, then, this way!" whereupon he unreaved a yard of red tape that lay on the desk and twisting it hurriedly about his own neck held the two ends high over his left ear, at the same time rolling his eyes and wagging his tongue down against his chin.

A dreadful groan went up from the prisoner and from the others in the court room. They understood the grim judicial kindergarten completely.

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions.

ARKANSAS....13, 61, 67, 81, 91, 100, 115
CALIFORNIA....77
CONNECTICUT....105
ILLINOIS....38, 40, 42
INDIANA, 2, 3, 7, 10, 11, 12, 25, 36, 54, 62, 72, 76, 78, 87, 90, 93, 107, 113, 123
IOWA....9, 66, 97
KENTUCKY....89
MARYLAND....114
MICHIGAN....1, 4, 21, 39, 45, 53, 65, 88, 101, 112, 124
MINNESOTA....71, 92
MISSOURI....31, 35, 74, 75
NEBRASKA....30
NEW JERSEY....5, 121
NEW YORK....60, 84
PENNSYLVANIA....18, 64, 86, 117, 125
RHODE ISLAND....6, 41, 116
SOUTH CAROLINA....120
TENNESSEE....19, 28, 34, 63, 83, 109
TEXAS, 24, 26, 29, 32, 33, 43, 51, 52, 58, 70, 85, 94, 95, 99, 103, 106, 108
UNITED STATES C. C....48, 59, 80
UNITED STATES C. C. OF APP....8, 16, 47
UNITED STATES S. C....46, 49, 50, 68, 69, 82, 110, 111, 122
UTAH....17
VIRGINIA....22, 37
WEST VIRGINIA....15, 44, 73, 96
WISCONSIN....14, 20, 23, 27, 55, 56, 57, 79, 98, 102, 104, 118, 119

1. ADMINISTRATION — Accounting by Guardian's Administrator.—How St. § 6760, provides that the judge of probate shall have jurisdiction of all matters relating to the settlement of estates of deceased persons, and of minors and others under guardianship: Held, that the judge of probate has power to cite the administrator of a deceased guardian to an accounting of the guardianship. —TUDHOPE V. POTTS, Mich., 51 N. W. Rep. 1110.

2. ADMINISTRATION — Sale of Decedent's Estate.— At the sale of decedent's estate the wife of one of the executors may, in the absence of fraud or collusion, bid and become a purchaser.—CRAWFORD V. GRAY, Ind., 30 N. E. Rep. 885.

3. ADMINISTRATION — Vendor and Vendee.—A father made a contract to convey land to his son, and provided that the price should be paid to his "heirs" after his death: Held, in a suit by his other children after his death to declare and enforce a vendor's lien, that the word "heirs" was used in the sense of "children," and that the purchase money was not payable to the vendor's administrator.—STEVENS V. FLANNAGAN, Ind., 30 N. E. Rep. 895.

4. ADMINISTRATOR—Appointment.—How. St. § 5851, declares that when there shall be delay in granting administration from any cause, an administrator may be appointed to collect and take charge of the estate, until the question occasioning the delay shall be determined, and an administrator appointed: Held that, although there is no property belonging to an estate except a right of action, and administration has been applied for, this does not prevent the appointment of a special administrator, where an immediate settlement could be made if such an administrator were appointed, and there is delay in granting administration. —GRECE V. HELM, Mich., 51 N. W. Rep. 1106.

5. ADMINISTRATORS — Executors — Mingling Trust Funds.—Where an executor mingles trust moneys with his own, or invests them in personal or real estate, his entire estate, either in his own hands or in the hands of his administrators, will be liable for the payment of such funds, in preference to his own creditors.—SMITH V. COMBS, N. J., 24 Atl. Rep. 9.

6. ADMINISTRATOR DE BONIS NON.—An administrator *de bonis non* may sue for the breach of a contract made by defendant with a preceding administrator *d. b. n.*, where the latter failed to bring the action before his removal, and where the money, if recovered, will be assets of the estate. — MCGUINNESS V. WHALEN, R. I., 24 Atl. Rep. 44.

7. ADMINISTRATOR'S SALE—Fraud.—Fraud on the part of an administrator, and the purchaser of land from him, in letting the purchaser have the land at less than another had offered and was willing and able to pay, does not render the judgment confirming the sale absolutely void.—PALMERTON V. HOOP, Ind., 30 N. E. Rep. 874.

8. APPEAL—Allowance of Interest.—When a judgment for money which does not award interest is affirmed without reference to the question of interest, such a decree is to be taken by the lower court as a declaration that no interest is to be allowed.— GREEN V. CHICAGO, S. & C. R. Co., U. S. C. C. of App., 49 Fed. Rep. 907.

9. APPEAL—Evidence. — The supreme court will not set aside a verdict as against the evidence unless all the evidence is submitted; and no attention can be given to the opinion of the trial judge as to such ground, even though such opinion is incorporated in the record on appeal.—KINSER V. SOAP CREEK COAL CO., Iowa, 51 N. W. Rep. 1151.

10. APPEAL— Objections not Raised Below. — Where improper language is used by counsel in addressing a jury, and the opposing party does not ask the trial court to rule thereon and except to such ruling when made, no question is raised which can be considered on appeal.—VANNATTA V. DUFFY, Ind., 30 N. E. Rep. 807.

11. APPEAL BY ONE OF CODEFENDANTS.—In proceedings supplemental to execution, where defendants joined in a plea in abatement, to which plaintiff filed a reply that was probably insufficient, but which was sustained by the trial court, to which ruling defendants jointly excepted, one of defendants, on appeal by him alone, cannot make such error available where he does not make his coparties in the court below parties in the appeal.— HALE V. MILLER, Ind., 30 N. E. Rep. 884.

12. APPELLATE JURISDICTION — Equity Suits. — The jurisdiction of the appellate court being limited by statute to "causes for the recovery of money only," it cannot entertain an appeal in an action for injunction as well as damages.—FT. WAYNE LAND & IMP. CO. V. MAUMEE AVENUE GRAVEL ROAD CO., Ind., 30 N. E. Rep. 915.

13. ATTACHMENT BOND — Parties. — Mansf. Dig. § 4933, provides that "every action must be prosecuted in the name of the real party in interest," except as otherwise specially provided: Held, in an action on the attachment bond for witness fees, that the witnesses must be joined as parties, unless the complaint shows that plaintiffs have paid or become liable to pay the witnesses, or are authorized by them to collect the fees.—MUNZESHEIMER V. BYRNE, Ark., 19 S. W. Rep. 320.

14. ATTORNEY AND CLIENT — Negligence. — Upon the facts: Held, that the negligence of the attorney was such that he was not entitled to recover for services.—ARMIN V. LOOMIS, Wis., 51 N. W. Rep. 1097.

15. ATTORNEY'S LIEN.— An attorney at law has no lien upon land for his fee or compensation for services in a suit wherein the land is recovered for his client.—HOGG V. DOWER, W. Va., 14 S. E. Rep. 995.

16. BAILMENTS—Hirer of Chattel.—The hirer of a chattel impliedly undertakes to use it well, to use it for no other purpose than that for which it is hired, to take proper care of it, and to restore it at the time appointed. In all these things he is bound to exercise the diligence of a prudent man; and for any default, whether his own personal fault or negligence or that of his subagents or servants, he is responsible to the owner.— SMITH V. BOUKER, U. S. C. C. of App., 49 Fed. Rep. 954.

17. BANKING—Certificate of Deposit.— A bank is not liable, even to an innocent holder for value, on a certificate of deposit issued before its organization or incorporation, and signed, as cashier, by the person who afterwards became such, there being nothing to show that the bank ever received any consideration therefor. —LONG V. CITIZENS' BANK, Utah, 29 Pac. Rep. 878.

18. CARRIERS—Passenger—Contributory Negligence.— Where a passenger waiting for a train at a station, the platform of which is properly constructed, stands so near the track as to be struck and killed by the bumper of a passing locomotive, the railroad company is not liable.—MATTHEWS V. PENNSYLVANIA R. CO., Pa., 24 Atl. Rep. 67.

19. CARRIERS — Passengers — Trespasser. — Where plaintiff, who was not in the employ of defendant railroad company, was riding on its timber train, on which no persons were allowed to be carried except the train men, and he was not there by invitation of any one who had authority to invite him, and had not paid any fare, and was injured in a collision between such train and another train of defendant, he was not entitled to recover, if the negligence of defendant's train men causing the accident was not wanton or willful.—ILLINOIS CENT. R. CO. V. MEACHAM, Tenn., 19 S. W. Rep. 232.

20. CONDITIONAL SALES — Validity. — Under Rev. St. § 2317, which provides that no contract for the conditional sale of chattels "shall be valid as against any other person than the parties thereto and those having notice thereof, unless such contract shall be in writing subscribed by the parties," etc., the conditions of such a contract, signed only by the purchaser, are void as against the creditors of the purchaser, and the property may be subjected to their claim.— S. L. SHELDON CO. V. MAYERS, Wis., 51 N. W. Rep. 1082.

21. CONFLICT OF LAWS — Insurance Contract. — The fact that an application for life insurance is made in Michigan does not render the contract a Michigan contract, where it appears in the by-laws indorsed upon the policy, that the application was to be of no force until approved at the principal office, situated in another State, and in the application furnished the assured that the contract should be considered as entered into in such other State, and governed by the laws of said State. — VOORHEIS V. PEOPLE'S MUT. BEN. SOC. OF ELKHART, Mich., 51 N. W. Rep. 1109.

22. CONSTITUTIONAL LAW— Jury Trial. — Code § 4106, which confers upon justices of the peace jurisdiction over the offense of keeping a bawdy-house concurrent with that of the county and corporation courts, is repugnant to Const. art. 1, § 10, guarantying to the accused in all criminal prosecutions the right to a speedy trial by an impartial jury; and the fact that sections 4107 and 4108 give in such a case the right of appeal and trial by jury in the appellate court does not relieve the statute of its repugnancy.—MILLER V. COMMONWEALTH, Va., 14 S. E. Rep. 979.

23. CONTRACT—Construction.—Where plaintiff agreed to dig a well for defendant at a certain rate per foot, and furnish him a sufficient quantity of water for his stock and family, plaintiff is not entitled to recover where the supply of water is altogether insufficient for the purposes intended.—GENNI V. HAHN, Wis., 51 N. W. Rep. 1096.

24. CONTRACT — Railroad Companies.—Where a railroad company, in consideration of the conveyance of a right of way, agrees to use water from a spring on the grantor's land, and pay him therefor by the month, the obligation to pay continues as long as the company uses the right of way, although it ceases to use the water.—HOWE V. HARDING, Tex., 19 S. W. Rep. 363.

25. CONVERSION—Pleading.—A complaint alleged that plaintiff was the owner of a note which was past due; that, while he was intoxicated, the note was wrongfully taken from him without his consent and sold to defendants; and that defendants subsequently delivered it to the makers for a new note: Held, that the complaint stated a cause of action against defendants for the conversion of the note.—HARLAN V. BROWN, Ind., 30 N. E. Rep. 928.

26. CORPORATIONS — Directors — Estoppel.—Directors of a corporation sued for false representations made by them to induce plaintiff to lend money to the corporation are not relieved from liability by the fact that under the by-laws of the corporation they had no power to make such loan, since by accepting the loan they are estopped to deny their power to make it.—KINKLER V. JURICA, Tex., 19 S. W. Rep. 359.

27. CREDITOR'S BILL—Execution.—Where a creditor's judgment is docketed subsequent to a conveyance by the debtor of his real estate, made with intent to hinder, delay, and defraud creditors, such creditor cannot maintain a bill to subject the real estate to the lien of his judgment, where no execution has been issued thereon; Rev. St. § 3029, providing for such an action whenever the execution shall have been returned unsatisfied.—GILBERT V. STOCKMAN, Wis., 51 N. W. Rep. 1076.

28. CRIMINAL LAW—Assault with Intent to Kill.—Under Code, § 5223, which provides that a person indicted for an assault with intent to commit a felony may be found guilty of an assault, or assault and battery, where defendant was indicted for assault with intent to commit murder in the second degree the court properly instructed that defendant might be convicted of a mere assault.—MORTON V. STATE, Tenn., 19 S. W. Rep. 225.

29. CRIMINAL LAW—Murder—Robbery.—A person who, while robbing another, shoots and kills him, is guilty

of murder in the first degree, though deceased fired the first shot, under Pen. Code, art. 606, providing that all murder committed in perpetration of robbery is murder in the first degree.—SMITH V. STATE, Tex., 19 S. W. Rep. 252.

30. CRIMINAL LAW—Necessity of Findings.—While in a civil action the failure of the court to find the facts upon which the judgment is predicated is ground of error, but does not render the judgment void, yet in a criminal prosecution, where the accused has pleaded "not guilty," there must be a finding or verdict of guilty to sustain a sentence.—STATE V. ATWATER, Neb., 51 N. W. Rep. 1073.

31. CRIMINAL LAW—Record on Appeal.—A motion to quash an indictment does not constitute part of the record proper, and, the motion not having been preserved by bill of exceptions, the supreme court cannot review the action of court below in sustaining it.—STATE V. HENDERSON, Mo., 19 S. W. Rep. 239.

32. DEED — Assignment.—Where the county records show that an assignment of "the within" is recorded on the same page as a deed in which the assignor is grantee, without any space or line intervening; that both the deed and the assignment purport to be acknowledged before the same officer on the same day; that both deed and assignment are recorded in the same handwriting and in the same ink; and that there is but a single file mark for the two instruments,—it is for the jury to determine whether the assignment refers to the deed, and to the land described therein.—HARLOWE V. HUDGINS, Tex., 19 S. W. Rep. 364.

33. DEED — Record.—Where an original deed is produced, with the seal of the officer taking the acknowledgment affixed thereto, and it is proved that such officer affixed his seal to the certificate at the time the acknowledgment was taken, the deed is properly of record, and admissible in evidence, although the county records show, in place of the word "Seal" opposite the notary's certificate of acknowledgment of this deed, the words "No seal on."—EQUITABLE MORTGAGE CO. V. KEMPNER, Tex., 19 S. W. Rep. 358.

34. DEED OF TRUST—Foreclosure.—Where the owner of land, after conveying it by deed of trust to secure debts, conveys it in fee, subject to the deed of trust, expressly reserving a lien for the purchase money, his administrator can, by reason of such lien interest, redeem from foreclosure of the deed of trust.—PEARCY V. TATE, Tenn., 19 S. W. Rep. 323.

35. DEED OF TRUST—Sale—Newspapers.—Rev. St. 1889, § 312, which provides that judges of certain circuit courts shall constitute boards for the purpose of awarding to a newspaper making the lowest and best bid the publication of "all advertisements, judicial notices, and orders of publication required by law to be made," applies only to publications pertaining to legal or judicial proceedings; and a sale of lands under a power contained in a trust deed was valid, though notice of such sale was published in a paper other than one designated by such judges.—DART V. BAGLEY, Mo., 19 S. W. Rep. 311.

36. DIVORCE—Attorney's Fees.—Under Rev. St. 1881, § 1042, which vests in the court, "pending a petition for divorce," power in its discretion to require the husband to pay such sum as will enable the wife to prepare her case for trial, an order may be made requiring him to pay her attorneys for services already rendered although the parties become reconciled, and the action is dismissed.—COURTNEY V. COURTNEY, Ind., 30 N. E. Rep. 914.

37. DIVORCE—Decree.—Husband and wife agreed to live separate and apart, each to acquire and hold property free from the claims of the other, and that a decree should be entered in a suit for divorce pending between them, confirming such agreement. Three years afterwards a decree was entered in the cause, reciting the taking of depositions and arguments of counsel, and confirming the agreement: Held, that such a decree was a decree from bed and board, within Code, § 2261, which provides that the same shall operate upon after-acquired property of the parties in like manner as a decree for divorce from the bond of matrimony.—MARSHALL V. BAYNES, Va., 14 S. E. Rep. 978.

38. DOWER IN MORTGAGED PROPERTY.—Under Rev. St. ch. 41, § 3, which provides that where a person seized of an estate of inheritance shall have mortgaged the same before marriage, the surviving husband or wife shall nevertheless have dower in the land as against every person except the mortgagee, a second wife, who survives her husband, is entitled to dower in land mortgaged by him and his first wife.—SHAPE V. SCHAFFNER, Ill., 30 N. E. Rep. 872.

39. ELECTIONS — Canvass.—Where the return of an election is made by a majority of the board of inspectors of such election, the canvassing board is bound by such return, and cannot go behind it for the purpose of determining frauds in such election.—MCQUADE V. FURGASON, Mich., 51 N. W. Rep. 1073.

40. EQUITY JURISDICTION — Quieting Title.—A person in possession under an unrecorded deed may sue in equity to establish his title, as against a subsequent grantee of the same grantor.—MORRISON V. MORRISON, Ill., 30 N. E. Rep. 768.

41. EQUITY JURISDICTION — Title.—Where a bill in equity alleges that complainants are the owners of certain land as heirs of the deceased owner; that defendant, who claims to be the heir, is not such; that defendant's guardian has executed mortgages on the land; and that the tenants in possession refuse to recognize complainants as owners, or to pay the rent to them; and prays that the mortgagees be enjoined from enforcing their mortgages,—the suit is, in effect, to recover possession of property by determining the title, and cannot be maintained, the remedy being, in the first instance, at law.—ROGERS V. ROGERS, R. I., 24 Atl. Rep. 46.

42. EVIDENCE — Accidents at Crossings.—In a case where it was a material question whether or not the view of the train which killed the deceased was obstructed by box cars then standing on a side track, and by other objects near the crossing, it is not error to refuse to admit in evidence photographs of the locality, taken two months after the accident, by a mere amateur photographer, who had never visited the locality before, especially when the court admitted a plat which showed the situation of the permanent objects at the place of the accident.—CLEVELAND, C. C. & ST. L. RY. CO. V. MONAGHAN, Ill., 30 N. E. Rep. 869.

43. EXECUTORS—Powers—Real Estate Agents.—Where a testator's will gives his executors power to sell his real estate, they can employ an agent to procure a purchaser for them, and the estate is liable for the agent's commissions; Rev. St. art. 2192, providing that executors shall be allowed all reasonable expenses and attorneys' fees necessarily incurred by them in the management of the estate, or in the course of administration.—ARMSTRONG V. O'BRIEN, Tex., 19 S. W. Rep. 268.

44. EXPERT TESTIMONY — Hypothetical Question. —In order to obtain the opinion of a witness on matters not depending upon general knowledge, but on facts, not testified to by himself either the witness must be present and hear all the testimony or the testimony must be summed up in the question put to him, and in either case the question is put to him hypothetically. —SEBRELL V. BARROWS, W. Va., 14 S. E. Rep. 996.

45. FALSE REPRESENTATIONS— Sale—Evidence.—In an action against a partner by the purchaser of his interest in the firm to recover for alleged false representations that the business was profitable, evidence that the business was unprofitable after the sale, unaccompanied by evidence that it was so before the sale, does not entitle the purchaser to recover.— TOTTEN V. BURHANS, Mich., 51 N. W. Rep. 1119.

46. FEDERAL COURTS — Abatement — Dissolution of Corporation.—Where a judgment of the federal circuit court in Tennessee against a New York corporation is reversed by the supreme court, and a new trial is ordered, but, pending the appeal, said corporation is dis-

solved by the courts of New York, and a receiver appointed, the suit abates.—PENDLETON v. RUSSELL, U. S. S. C., 12 S. C. Rep. 743.

47. FEDERAL COURTS— Circuit Court of Appeals.—Under the act establishing the circuit court of appeals, which provides, in section 11, that all existing provisions of law "regulating the system and methods of review through appeals and writs of error," shall be applicable to such review in the circuit court of appeals, a writ of error returnable to the circuit court of appeals may be issued from the clerk's office of the circuit court in which the action was tried.—NORTHERN PAC. R. CO. v. AMATO, U. S. C. C. of App., 49 Fed. Rep. 881.

48. FEDERAL COURTS — Inhabitant. — The term "inhabitant," as used in the first section of the judiciary act, includes a foreign corporation, engaged in business in the district in which it is sued, according to the laws thereof.— GILBERT v. NEW ZEALAND INS. CO., U. S. C. C. (Oreg.), 49 Fed. Rep. 884.

49. FEDERAL COURTS — Jurisdiction — Citizenship. — Where the transfer of a judgment gives the diversity of citizenship necessary to render a suit thereon cognizable in the federal courts, the fact that this is one of the motives of the transfer does not affect the federal jurisdiction, if the change of title is in fact absolute, and for a good consideration.—CRAWFORD v. NEAL, U. S. S. C., 12 S. C. Rep. 759.

50. FEDERAL COURTS— Supreme Court—Jurisdiction. Under the judiciary act of March 3, 1891, §§ 4, 14, and the joint resolution of the same date, the supreme court cannot entertain jurisdiction of any direct appeal or writ of error from the circuit or district courts except in the six classes of cases enumerated in section 5, unless the cause was pending at the date of the act, and the appeal was allowed or the writ sued out before July 1, 1891.—NATIONAL EXCH. BANK OF BALTIMORE v. PETERS, U. S. S. C., 12 S. C. Rep. 767.

51. FRAUDS, STATUTE OF.—Defendant promised to pay for goods to any reasonable amount that might be sold to an employee. The greater part of the goods desired had already been sold. The employee kept his wages drawn so that the defendant did not owe him anything at any time, and there was no agreement by which he was to be released from liability, and the defendant made liable in his stead: Held that the promise was collateral, and should have been in writing.—COBB v. WARD, Tex., 19 S. W. Rep. 250.

52. FRAUDS, STATUTE OF— Land Contract.—Where the vendee under a parol sale of land made no improvements thereon, the facts that he paid the purchase price, went into temporary possession, and subsequently paid the taxes; that the vendor had agreed to make a deed, and died insolvent,—are not sufficient to take the contract out of the operation of the statute of frauds, and the vendee acquired no title to the land.—BRADLEY v. OWSLEY, Tex., 19 S. W. Rep. 340.

53. FRAUDULENT CONVEYANCES—Husband and Wife.—In a suit in aid of execution against a husband to set aside a deed by the latter to his wife, it appeared that the deed was given in payment of a *bona fide* debt, and was recorded before the debt for which the judgment was had was contracted, and there was no evidence that the wife took the deed with any frauduleut intent: Held, that the deed was valid, and plaintiff could not recover.— STRAUSS v. PARSHALL, Mich., 51 N. W. Rep. 1117.

54. HUSBAND AND WIFE—Land Held by Entireties.—Where a husband and wife hold,as tenants by entireties, the real estate acquired by them under the same conveyance, and such property has been sold by them, and the proceeds thereof remain in the hands of the agent, no division of them having been made, the husband and wife each take a moiety of the proceeds, and the interest of the husband while in the agent's hands may be subjected to the payment of his debts by proceedings in garnishment. — FOGLEMAN v. SHIVELY, Ind., 30 N. E. Rep. 909.

55. INJUNCTION — Jurisdiction of Supreme Court.—In a suit brought in the name of the State by the attorney general, on the relation of a citizen and tax payer, against the secretary of State, the supreme court has original jurisdiction to determine whether certain warrants on the State treasurer, drawn by defendant in favor of the State superintendent of public instruction, for clerk hire and traveling expenses, are in violation of law.—STATE v. CUNNINGHAM, Wis., 51 N. W. Rep. 1133.

56. INJUNCTION — Schools. — Where a school district, through its board of directors, contracts with a builder to erect a school house, and such contract, is either void or voidable, at the district's option, an injunction will not lie against such builder to prevent him from proceeding, the district's remedy being to refuse to ratify or confirm the contract, and defend against an action for the contract price.—JOINT SCHOOL-DIST. NO. 17 OF TOWNS OF OTTAWA AND SUMMIT v. REID, Wis., 51 N. W. Rep. 1089.

57. INSURANCE— Proof of Loss.— Under the provision of a fire policy that assured should within 6 days give notice of loss, and within 30 days thereafter render proofs of loss, loss to be payable 60 days after receipt of proof of loss at the company's office, failure to furnish proofs within 30 days will not, in the absence of a provision to that effect, operate as a forfeiture of the policy, but will merely postpone the maturity of the claim. — VANGINDERTAELEN v. PHENIX INS. CO. OF BROOKLYN, Wis., 51 N. W. Rep. 1122.

58. INSURANCE AGENCY — Contract.— One who enters into a contract with the general agent of an insurance company, whereby the latter appoints him district agent, and fixes his compensation by commission on the original cash premiums on policies secured by him, the contract providing that he shall have no claims for commissions or other services against the company, has no right of action against the company for breach of the contract.— LESTER v. NEW YORK LIFE INS. CO., Tex., 19 S. W. Rep. 356.

59. INSURANCE COMPANIES—Agents.— Where the regulations of an association having a benefit department require the secretary of each local division to certify to the health of every applicant for insurance, to keep a correct list of the members of the benefit department, to place thereon the name of any member of the insurance department joining his division by transfer from any other division, and also make it the duty of members to notify him of any change of residence, such secretary must be considered an insurance "agent" of the association, under Rev. St. Wis. § 2637, subd. 9, and section 1977, declaring who shall be considered agents of a foreign insurance company for the purpose of receiving service of process.—DIXON v. ORDER OF RAILWAY CONDUCTORS OF AMERICA, U. S. C. C. (Wis.), 49 Fed. Rep. 910.

60. INTOXICATING LIQUORS—Civil Damage Laws.—Under Laws 1873, ch. 646, making a seller of liquor liable for injuries to others caused by the intoxication of the person to whom the liquor was sold, a liquor seller is not liable where a person was injured by the reckless driving of a drunken man, who did not himself purchase the liquor by which he was intoxicated, but which was purchased by a friend, it not being shown that the drunken person was a participant in such purchase.—DUDLEY v. PARKER, N. Y., 30 N. E. Rep. 737.

61. INTOXICATING LIQUORS — Local Option. — Under Mansf. Dig. § 4524, as amended by Acts 1889, p. 139, which provides that the sale of intoxicating liquors shall be prohibited within three miles of any school house or church where a petition has been presented to the county court, signed by a majority of the inhabitants residing within three miles of such school house or church the petition must be signed by a majority of all the inhabitants within such three-mile limit, though it includes a portion of a county other than that in which the school house or church is situated.—WILSON v. THOMPSON, Ark., 19 S. W. Rep. 321.

62. JUDGMENT—Writs— Return.— In a suit to vacate a judgment on the ground that there was no service of the summons, and that the return thereon was false,

the return, being regular on its face, is conclusive, in the absence of any allegation of fraud. —CULLY v. SHIRK, Ind., 30 N. E. Rep. 882.

63. JUDGMENT AGAINST LEGATEE — Lien. — Where a legatee is indebted to his testator's estate an equitable lien on the legacy exists in favor of the estate prior to that of a judgment creditor of the legatee.—IRVIN v. PALMER, Tenn., 19 S. W. Rep. 326.

64. LANDLORD AND TENANT.—The wife of a lessee, who by the terms of the lease took on himself the duty of making all the necessary repairs, cannot, in an action against the lessor for personal injuries resulting from the giving away of a floor, prove a parol agreement contemporaneous with the lease, providing for repairs by the lessor, in the absence of an averment of fraud, accident or mistake. — WODOCK v. ROBINSON, Pa., 24 Atl. Rep. 73.

65. LANDLORD AND TENANT — Agreement to Repair.—The owner of a building leased it to defendants for a furniture store, and covenanted to put the roof in good repair and keep it so. The roof was in a leaky condition, by reason of which some of their goods were damaged. Defendants notified the lessor of the defective roof, and requested him to repair the same, which he failed to do, and defendants abandoned the premises before the expiration of their lease: Held, in an action for rent accruing subsequently to such abandonment, that defendants were not liable.— PIERCE v. JOLDERSMA, Mich., 51 N. W. Rep. 1116.

66. LANDLORD'S LIEN— Removal of Property.— Since the lien which Code, § 2019, provides a landlord shall have upon any personalty of the tenant used on the premises during the term is not extinguished by removal of the property, a landlord cannot enjoin an electric light company, occupying his land under a lease for a term of years, from removing before the end of the lease to other premises within the city, on which the company intends to continue and enlarge its business, the company not being in arrears for rent, and its property being easily identified.—CARSON v. ELECTRIC LIGHT & POWER CO., Iowa, 51 N. W. Rep. 1144.

67. LIFE INSURANCE — Beneficial Interest. — Where a complaint in an action by one of the beneficiaries in a life insurance policy against another beneficiary admits that defendant is entitled to reimbursement for money advanced upon the policy and after defendant has answered, the complaint is amended so as to deny defendant's right to any part of the policy, a contention that defendant is estopped, by facts admitted in the answer, to claim any part of it, can have no force which must not also be given to the admission in the complaint.—MCDONALD v. HUMPHRIES, Ark., 19 S. W. Rep. 234.

68. LIFE INSURANCE—Creditor as Beneficiary.—A clause in an insurance policy upon a debtor's life, reciting that it is payable upon his death to his creditor if living, if an admission at all by the company of the relation of debtor and creditor, is an admission only at the date on which the policy was issued; and, in an action to recover on such a policy, the creditor must furnish positive proof of the fact that he is a creditor, and of the amount of his debt, and for this purpose the recital in the policy and the creditor's statements in the proofs of death are not sufficient.—CROTTY v. UNION MUTUAL LIFE INS. CO. OF MAINE, U. S. S. C., 12 S. C. Rep. 749.

69. LIMITATIONS — Adverse Possession. — In Illinois, the general rule that limitation does not run against a reversioner or remainder-man pending the prior estate is subject to an exception in favor of one in actual possession under claim of title, made in good faith, under a fee-simple conveyance from the owner of the prior estate, and without notice, actual or constructive, of the claims of the remainder-men.—LEWIS v. BARNHART, U. S. S. C., 12 S. C. Rep. 773.

70. LIMITATION OF ACTIONS.—The fact that a claim for a teacher's salary has been audited and allowed by the commissioner's court of a county does not render it a "judgment" enforceable within 10 years, under article 3210, Rev. St. but where it is afterwards repudiated, and payment refused, 4 years' statute of limitations applies. —PRUITT v. DURANT, Tex., 19 S. W. Rep. 281.

71. LIMITATION OF ACTIONS.—Under Gen. St. 1878, ch. 66, § 16, relating to limitations of actions, where a cause of action not arising in this State, nor accruing to a citizen thereof, has come under the operation of the limitation law of another State, and continued under its operation until it became a bar, it is to be recognized here as a bar.—LUCE v. CLARKE, Minn., 51 N. W. Rep. 1162.

72. MANDAMUS.—Where a board of commissioners submits the question of purchasing a certain toll road to the electors of the townships through which the road runs, at which election a majority of such voters declare in favor of the purchase, and the board afterwards refuses to make an order for such purchase, *mandamus* will not lie to compel the board to make such order, its action being a judicial one.—STATE v. BOARD OF COM'RS OF TIPPECANOE COUNTY, Ind., 30 N. E. Rep. 892.

73. MASTER AND SERVANT—Assumption of Risk.—When a servant enters into the employment of a master he assumes all the ordinary hazards incident to the employment, whether the employment be dangerous or otherwise. The test of liability is the negligence of the the master, not the danger of the employment, though the danger of the employment may help to determine the ordinary care required in the case.—KNIGHT v. COOPER, W. Va., 14 S. E. Rep. 999.

74 MASTER AND SERVANT—Injury—Notice of Defects. —The petition, which charges that such timbers and props were required and that defendant was notified of the fact, and requested to furnish them, but neglected and refused to do so, was insufficient without a specific charge that defendant was guilty of a willful disregard of its duty.—LESLIE v. RICH HILL COAL MIN. CO., Mo., 19 S. W. Rep. 308.

75. MASTER AND SERVANT—Risks of Employment.—In an action against a railroad company for injury received by a locomotive fireman, it appeared that a freight-car, without sufficient brakes to hold it, was left standing on a side track, and during the night, by reason of the wind or of its own weight, it moved down on the main track, where plaintiff's locomotive collided with it, causing the injuries complained of: Held, that the accident was not caused by any peril of the service, which plaintiff assumed.—HENRY v. WABASH W. RY. CO., Mo., 19 S. W. Rep. 239.

76. MECHANICS' LIENS—Notice.—Elliott's Supp. § 1690, provides that the notice of intention to acquire a mechanic's liens, filed with the recorder, must specify the amount of the claim, and a description of the property: Held that, although a subcontractor or material-man must, under the statute of 1883, notify the owner of his intention to acquire a lien, he is not bound to state the fact of such notice in the notice filed with the recorder. —ADAMS v. BUHLER, Ind., 30 N. E. Rep. 883.

77. MONEY HAD AND RECEIVED—When Lies.—An action for money had and received does not lie to recover money placed in defendant's hands as an officer of a land pool, and with plaintiff's consent invested in land contracts in trust for plaintiff, though defendant, after the purchase, contrary to plaintiff's wishes, transferred the contracts to a corporation formed of the members of the pool, and refused to issue to plaintiff his proportion of stock in the corporation.—MCCREERY v. WELLS, Cal., 29 Pac. Rep. 877.

78. MORTGAGES — Foreclosure.—An agreement, after the maturity of a note, to extend the time of payment, is no bar to foreclosure, before the expiration of the period of extension, of the mortgage securing the note, the only remedy for violation of the agreement being an action for damages.—AYRES v. HAMILTON, Ind., 30 N. E. Rep. 895.

79. MORTGAGE FORECLOSURE — Counterclaim.—In an action to foreclose a purchase-price mortgage, where the answer alleges that the purchase of the land and the execution of the mortgage were induced by the fraudulent misrepresentations of plaintiff as to the

quality and value of the land, but fails to state the value of the land had it been as represented, and the amount of damage resulting from the fraud, the answer presents only a defense of a total failure of consideration, and not a counterclaim for damages.—KOBITER V. ALBRECHT, Wis., 51 N. W. Rep. 1124.

80. MORTGAGE—Priorities.—Even if a mortgage, given to secure the purchase price of property in Louisiana, has become perempted, the vendor's privilege survives, and the assumption thereof by a new purchaser continues the same against him and upon the property, outranking even that of the second vendor; and, if such assumption is executed before a notary and two witnesses, executory process will issue under Code Pr. arts. 732, 733.—HENDERSON V. GOOD, U. S. C. C. (La.), 49 Fed. Rep. 887.

81. MORTGAGES — Redemption.—In a suit by a judgment creditor to redeem mortgaged premises it appeared that plaintiff bought the land at the execution sale on his judgment; that at the date of the rendition of judgment defendant held two valid mortgages on the land; that, after the rendition of judgment, but before plaintiff's purchase, defendant bought up several claims against the judgment debtor and mortgagor, took a deed from him in satisfaction of all demands, and went into possession: Held, that plaintiff was entitled to redeem on payment of the mortgage liens, and could not be compelled to pay the debts contracted after the judgment lien attached.—COHN V. HOFFMAN, Ark., 19 S. W. Rep. 233.

82. MUNICIPAL BONDS—Limitation of Indebtedness.—Const. Iowa 1857, art. 11, § 3, restricts the indebtedness of political and municipal corporations to 5 per cent. of the taxable value of the property within their limits, and the purchaser of bonds issued by a school district, no matter what recitals appear on their face, is bound to take notice of this limitation, and of the official assessment of the taxable property within the district.—NESBIT V. INDEPENDENT DISTRICT OF RIVERSIDE, U. S. S. C., 12 S. C. Rep. 746.

83. MUNICIPAL CORPORATION—Defective Sidewalks.—In an action against a city for personal injuries from a defective sidewalk, the mere fact that one is a resident and pays taxes does not make him incompetent as a juror, by reason of interest.—MAYOR, ETC., OF CITY OF JACKSON V. POOL, Tenn., 19 S. W. Rep. 324.

84. MUNICIPAL CORPORATION — Grading Contract.—Where, in an action against a city on a contract which required plaintiff to grade a street to the satisfaction of the commissioner of public works, and according to certain plans and specifications, the answer admits that the rock excavation required by the contract has been completed, and the work accepted by the commissioner, evidence that the rock has not been excavated as required is inadmissible, and, though received, will not be considered, on review, to reverse a verdict for plaintiff by direction.—BRADY V. MAYOR, ETC., OF CITY OF NEW YORK, N. Y., 30 N. E. Rep. 757.

85. MUNICIPAL CORPORATION—Obstruction in Street.—In an action against a city for injuries caused by the falling of a timber from a pile of lumber, it appeared that the pile of lumber was in the street, and that such a pile had been there for several years; that plaintiff, a minor, was playing near the pile, when a drayman drove against it, causing the timber to fall. The city's charter gave it full control over the streets, and its ordinances required the removal of all obstructions from the streets: Held, that the question of the city's negligence was for the jury, and that it was error to instruct that the proximate cause of the injury was not the pile of lumber, but was the act of the drayman, and the city was not liable.—GONZALES V. CITY OF GALVESTON, Tex., 19 S. W. Rep. 284.

86. MUNICIPAL CORPORATION—Peddling—Ordinance.—An ordinance practically prohibiting peddling and selling goods from house to house, by sample or otherwise by requiring a high license to be first obtained, which excepts from its operation residents of the borough, is not a valid exercise of police power, but a discriminating trade regulation, and is void.—BOROUGH OF SAYRE V. PHILLIPS, Penn., 24 Atl. Rep. 76.

87. MUNICIPAL CORPORATION—Turnpike—Annexation.—A city, by merely extending its limits, cannot deprive a private corporation, thereby embraced of the franchise of exacting tolls, since private property can be taken by the public only by virtue of eminent domain or the police power.—FT. WAYNE LAND & IMP. CO. V. MAUMEE AVE. GRAVEL ROAD CO., Ind., 30 N. E. Rep. 880.

88. MUNICIPAL POLICE—Police Officer.—A police officer who is charged with felony, cannot shield himself from dismissal by the police board by alleging that the charge is too serious for the board to consider.—WELLMAN V. BOARD OF METROPOLITAN POLICE OF CITY OF DETROIT, Mich., 51 N. W. Rep. 1070.

89. MUNICIPAL TAXATION.—In an action by a city to collect an *ad valorem* tax on defendant's boats, where it appeared that the city was his residence, as well as the home port of his boats, he was liable for the tax, under the city's charter, which provided that it should have power to assess such tax on personal and mixed estate "within the city limits," subject to taxation by the city under the laws of the State.—CITY OF NEWPORT V. BERRY, Ky., 19 S. W. Rep. 238.

90. NATIONAL BANKS — Reduction of Stock. — Stockholders in a national bank, to meet an impairment of $75,000 in the capital stock arising from the insolvency of a borrower and the apparent worthlessness of the collaterals, acting under Rev. St. U. S. 1878, § 5143, reduced the capital stock $75,000, at the same time voting to take the depreciated securities, which were the cause of the impairment of the capital, from the assets, and place them in the hands of trustees for the benefit of stockholders: Held, that as it must be presumed that the comptroller of the currency, in determining the amount of impairment, took into consideration any value that these collaterals had, they could not thus be withdrawn, as such withdrawal would thereby further impair the capital.—MCCANN V. FIRST NAT. BANK OF JEFFERSONVILLE, Ind., 30 N. E. Rep. 893.

91. NEGLIGENCE — Fires. — A compress company, which was in the habit of receiving cotton at its sheds, had a contract with defendant railroad company to transport the cotton to its works across the river. By reason of defendant's delay in furnishing transportation, cotton accumulated in the sheds and adjacent streets, and caught fire, which was communicated to plaintiff's warehouse: Held, that defendant's delay in furnishing transportation was in no legal sense the cause of the fire.—MARTIN V. ST. LOUIS, ETC. RY. CO., Ark., 19 S. W. Rep. 314.

92. NEGLIGENCE—Manufacture of Defective Article.—If one engaged in the business of manufacturing goods not ordinarily of a dangerous nature, to be put upon the market for sale and for ultimate use, so negligently constructs an article that by reason of such negligence it will obviously endanger the life or limb of any one who may use it, and if the manufacturer, knowing such defects, and knowing that the same are so concealed that they are not likely to be discovered, puts the article in his stock of goods for sale he is liable for injuries caused by such negligence to one into whose hands the dangerous implement comes for use in the usual course of business, even though there be no contract relation between the latter and the manufacturer.—SCHUBERT V. J. R. CLARK CO., Minn., 51 N. W. Rep. 1103.

93. NEGLIGENCE—Pleading.—In an action against a railroad company for the wrongful death of plaintiff's intestate an allegation of the complaint that intestate was without "fault or negligence" is sufficient to negative contributory negligence unless the facts specially pleaded clearly show that he was guilty of contributory negligence.—LOUISVILLE, E. & ST. L. CONSOLIDATED R. CO. V. SUMMERS, Ind., 30 N. E. Rep. 873.

94. NEGLIGENCE—Receiver.—In a joint action against a railroad company and its receiver for the death of a servant, caused by the negligence of the receiver, a recovery cannot be had against the company, where

the receiver was not primarily liable.—TEXAS PAC. RY. CO. v. COLLINS, Tex., 19 S. W. Rep. 365.

95. NEGOTIABLE INSTRUMENT — Joint and Several. — A debtor who signs a joint and several note payable to his creditor, with an understanding that the latter is to procure the signature of another person, is liable on the note, though such other person does not sign it.—GARRISON v. NELSON, Tex., 19 S. W. Rep. 248.

96. OFFICE AND OFFICERS — Sheriff's Bond — Office—Quo Warranto—Parties.—Where a sheriff has been regularly elected, and, having qualified and given bond as required by law has assumed the duties of his office, such office cannot be declared vacant by the county court, under section 20 of chapter 10 of the Code, for failure to give a new or additional bond to that already given, when so required by said court, until he is notified of such requirement.—STATE v. SHANK, W. Va., 14 S. E. Rep. 1001.

97. PARENT AND CHILD—Custody of Child.—Code, §§ 2241, 2242, declaring that the parents are the natural guardians of their minor children, and are equally entitled to the care and custody of them, and that, on the death of one parent, the survivor becomes the guardian, do not give a father the absolute right to the custody of his minor child, but the best interest of the child is the controlling consideration.—IN RE LALLY, Iowa, 51 N. W. Rep. 1155.

98. PARTIES.—In an action to recover damages for the conversion of money paid to defendants for plaintiff's use, and by them paid to one S, who claimed a lien on the money for professional services rendered plaintiff, the presence of S as a party was not necessary to "a complete determination of the controversy," within Rev. St. § 2610, as amended by Laws 1883, which provides that in such cases the court may order new parties to be brought in.—CARROL v. FETHERS, Wis., 51 N. W. Rep. 1128.

99. PARTITION—Estoppel.—Where, in proceedings for the partition of land among the heirs, one of the heirs, a married woman, joins in the partition with her husband, by deed, but her privy acknowledgment is not duly taken, and she accepts the portion allotted to her, and afterwards sells it to one not a party to the partition, she and those claiming under her are estopped to assail the partition.—TOLKIN v. ANDERSON, Tex., 19 S. W. Rep. 350.

100. PLEDGE — Collateral Security. — The giving of notes as collateral security for a debt amounts to a conditional payment only, and the creditor may, on default of payment, prosecute both claims to judgment, and collect what is due him on either the principal debt or the security.—BARNS v. BRADLEY, Ark., 19 S. W. Rep. 319.

101. PRINCIPAL AND AGENT.—Where plaintiffs, as agents of defendant, loaned money for her on a mortgage, under an agreement to charge nothing for loaning the money and collecting interest, defendant was liable to plaintiffs for money expended by them in foreclosing the mortgage.—LYON v. SWEENY, Mich., 51 N. W. Rep. 1106.

102. PRINCIPAL AND AGENT — Revocation.—Plaintiff, being dissatisfied with the act of his agent, C, in managing a settlement of his affairs with defendant, appointed another agent, D, who forthwith went to defendant, showed his authority to represent plaintiff, and told defendant to settle the matter with him, and not with C: Held, that the act of D was a sufficient notice to defendant that C's authority had been revoked, and of the appointment of D.—JOHNSON v. YOUNGS, Wis., 51 N. W. Rep. 1095.

103. PUBLIC LANDS—Homestead.—Land pre-empted as a homestead, and sold before the completion of the three years' occupancy prescribed by law, does not become vacant, if possession be taken and kept by the vendee; and the patent, therefore may issue as if the original occupancy had continued.—PALMER v. BENNETT, Tex., 19 S. W. Rep. 304.

104. PUBLIC LANDS—Lots Bounded by Water-courses. Where a section is divided by a water-course, and is subdivided in lots instead of regular subdivisions, and a lot bounds on the water-course, the water-course itself, and not the meander lines thereof, is the proper boundary; and, if the grantee does not find the water-course as called for by his patent, he may go as far as the next "eighth line" to locate his boundary.—LALLY v. ROSSMAN, Wis., 51 N. W. Rep. 1132.

105. RAILROAD COMPANIES—Construction and Traffic Contracts.—A traffic contract for 99 years, entered into by one railroad company with another having no road, and whose proposed road is 18 miles distant from the first, which has no present authority to build a connecting branch, even if the other had a road, being entered into by the directors and officers for the personal profit and advantage of individual members, though known to be injurious to the company, will be set aside on application of stockholders.—BOSTWICK v. CHAPMAN, Conn., 24 Atl. Rep. 32.

106. RAILROAD COMPANIES—Contributory Negligence. —In an action against a railroad company for damages for the killing of plaintiff's daughter while crossing defendant's track on a float, the court properly refused to instruct that, if the jury believed defendant left a long train on the side track, so as to conceal the approaching train which killed deceased, or that the noise of the float on which she was riding prevented her from hearing the bell and whistle of the cars, then she was not guilty of contributory negligence in attempting to cross the tracks.—CALHOUN v. GULF, C. & S. F. RY. CO., Tex., 19 S. W. Rep. 341.

107. RAILROAD COMPANIES— Injuries—Employment of Physician. — Held upon the facts that, since the emergency required immediate action, the employment of plaintiff by conductor bound defendant for plaintiff's services rendered in the amputation of the employee's leg.— EVANSVILLE & R. R. CO. v. FREELAND, Ind., 30 N. E. Rep. 803.

108. RAILROAD COMPANIES—Street Railroads—Defective Track.—In an action against a street railroad company for negligently allowing its rails to protrude above the surface of the street, thereby causing plaintiff to be thrown from a conveyance and injured, an instruction that a street railway company must so maintain its track as to not unnecessarily impede travel or to render travel more dangerous to persons using ordinary prudence than it would be but for such track being there in the condition it was, is not objectionable as assuming that the track impeded travel, or rendered travel more dangerous than it would have been but for the presence of the track.—HOUSTON CITY ST. RY. CO. v. DE LESDERNIER, Tex., 19 S. W. Rep. 336.

109. RAILROAD CORPORATIONS — Indictment. — Railroad corporations are liable to indictment for obstructing a highway.—STATE v. LOUISVILLE & N. R. CO., Tenn., 19 S. W. Rep. 229.

110. RECEIVERS — Railroad Companies. — A court of equity can appoint receivers for an insolvent railroad company, on the application of the company itself, by a petition showing that its property is likely to be seized by different courts, its assets dissipated, and the system disrupted; but cannot displace vested liens, and must require that the property shall be held and preserved by the receivers for the benefit of all concerned therein, as their interests may appear.—QUINCY, M. & P. R. CO. v. HUMPHREYS, U. S. S. C., 12 S. C. Rep. 787.

111. RECEIVERS— Railroad Companies.—The receiver of an insolvent railroad corporation, originally formed by the consolidation of two separate companies, does not by virtue of his appointment become the assignee of a branch line lease executed to one of the companies before the consolidation; and where the income of the leased line is insufficient to pay its operating expense, and it is also unprofitable as a feeder or connection, the property of the consolidated corporation should not be taken, without the consent of its creditors, for the purpose of paying the rental of the leased line.— ST. JOSEPH & ST. L. R. CO. v. HUMPHREYS, U. S. S. C., 12 S. C. Rep. 795.

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112. RELEASE — Cancellation. — In a suit to set aside, on the ground of fraud, a release to defendant of plaintiff's interest in the estate of the deceased daughter, the evidence disclosed that defendant was attorney for decedent in her life-time, and had entire control of her estate at her death; that the release was procured by defendant's concealing the amount and value of the estate, and representing that it was of little value and that the expenses and claims would absorb it: Held, that plaintiff was entitled to the relief sought.—BEEDLE V. CRANE, Mich., 51 N. W. Rep. 1070.

113. RELEASE OF CLAIM FOR DAMAGES.—In an action for injuries alleged to have been caused by defendant's negligence, the complaint, after proper averments, set out a written release, which recited that plaintiff, in consideration of a sum of money paid to him, and of the payment of certain doctor's fees, waived all claims for damages against defendant: Held that, as the writing was incomplete, and did not of itself constitute an enforceable contract, in order to give it legal effect it was proper to allege and prove extrinsic facts.—KENTUCKY & I. CEMENT CO. V. CLEVELAND, Ind., 30 N. E. Rep. 802.

114. RES JUDICATA.—A lunatic brought suit against defendant and W to set aside deeds which he alleged he was fraudulently induced to execute while of unsound mind. Defendant and W answered the bill, denying the unsoundness of plaintiff's mind and the fraud. Plaintiff's sister was made a party plaintiff on her interlocutory petition, claiming the property in question. The court filed a decree in substance as follows: "This case being submitted on bill, answers, and exhibits, and by agreement of counsel, it is, by and with the consent of all parties to the cause, adjudged, ordered, and decreed that the bill be, and the same is hereby, dismissed, each side to pay their own costs:" Held, in a subsequent suit by the lunatic against defendant and the sister to set aside the same deeds on the ground of the same fraud and the weakness of plaintiff's mind, that the former decree was a bar to such subsequent suit.—ROYSTON V. HORNER, Md., 24 Atl. Rep. 25.

115. SALE — Delivery. — Plaintiff bought a mule colt, paid the price agreed, and its delivery at a subsequent date and place was agreed on. Afterwards, on the same day, the vendor sold the colt to defendant: Held, that there was no delivery, and the title did not pass, so as to protect the vendee against a subsequent innocent purchaser from the vendor.—HIGHT V. HARRIS, Ark., 19 S. W. Rep. 235.

116. SET-OFF — Evidence. — In *assumpsit* to recover money alleged to be due plaintiff from defendants' testator, where it appears that plaintiff was testator's son and lived with and was supported by him after coming of age, and that on asking testator on one occasion for the money he was told either to let testator hear no more of it, or to take the money and leave the house, to which plaintiff made no answer, but continued to live with testator, the debt must be deemed satisfied.—THURBER V. SPRAGUE, R. I., 24 Atl. Rep. 48.

117. SPECIFIC PERFORMANCE — Fraud.—Where plaintiff, desiring to purchase real estate for the location of a blacksmith shop, was told, during negotiations with defendant's agents for the purchase of defendant's land, that the property would not be sold for an objectionable purpose whereupon he deceived the agents as to his occupation and concealed his object in buying the land, and the evidence showed that the erection of dwelling houses on the premises was discussed, and sketches made to show how such dwellings could be built, and the negotiations ended in the execution of an unconditional contract of sale, plaintiff cannot when defendant learns his true purpose, and for that reason repudiates the contract, obtain a specific performance thereof.—BROWN V. PITCAIRN, Pa., 24 Atl. Rep. 52.

118. STATUTES — Construction — Repeal.— Under Rev. St. § 4985, providing that provisions of such statutes which are the same in substance as existing laws shall be construed as a continuation of such laws, where the provisions of a section of the Revised Statutes are embodied in a subsequent statute, the latter must be construed as a continuance of the former, and not a repeal and re-enactment thereof. — COX V. NORTH WISCONSIN LUMBER CO., Wis., 51 N. W. Rep. 1130.

119. TROVER AND CONVERSION—Pleading.—Defendant in trover answered, by way of justification, that he took the goods, alleged to have been converted under execution against the person from whom plaintiff claimed them under mortgages and a bill of sale, and that the goods were at that time the property of the execution debtor, and liable to seizure and sale: Held, that the answer was sufficient to authorize the admission of evidence that plaintiff's title was fraudulent as to creditors of the execution debtor.—WELCOME V. MITCHELL, Wis., 51 N. W. Rep. 1080.

120. TRUSTEE—Accounting.—A son entered into a contract with his mother, since deceased, whereby he was given control of her plantation and mills, with all the earnings thereupon, on condition that he would pay taxes and provide confortable support of herself and daughter, which contract he fulfilled: Held, that he must account for whatever personalty, in the way of plantation and family supplies, was on the land when he took over, subject to just requirements, as where stock died or was disposed of by his mother, but not for rents and profits up to date of her death.—MCFALL V. MCFALL, S. Car., 14. S. E. Rep. 985.

121. TRUST—Loss of Fund.— When a fund is held in trust for the benefit of one person for life, and another in remainder, and part of that fund is lost because of the insecurity of a particular investment, such loss is to be apportioned between the life tenant and remainder-man in the proportion which the principal sum involved in the insufficient security bears to the interest due upon it at the time when the security is realized upon, and the amount of the loss is determined.—IN RE TUTTLE, N. J., 24 Atl. Rep. 1.

122. UNITED STATES SUPREME COURT— Jurisdiction.— A decision by the Supreme Court of Louisiana that certain State bonds, issued in 1864, were invalid, because they were exchanged by the State authorities for sugar, instead of for State or Confederate currency, as required by the act authorizing their issuance, and that, therefore, the holder was not entitled to exchange them for consolidated State bonds, under the funding act of 1874, involved no federal question, and is not reviewable in the United States Supreme Court.— SAGE V. BOARD OF LIQUIDATION OF LOUISIANA, U. S. S. C., 12 S. C. Rep. 755.

123. WATERS — Surface Water — Roads.— A township cannot collect, in artificial ditches along the sides of a road, surface water, which naturally flows away from the road, and by a culvert conduct it all on to one side of the road; thereby causing it to be thrown on the land of a property owner on that side.—PATOKA TP. V. HOPKINS, Ind., 30 N. E. Rep. 896.

124. WILLS—Devise. —Testator left certain real estate to his widow, "subject to the condition that she is to receive the rents, profits, and benefits during her natural life-time, and, in case necessary, to sell and dispose of the same according to law:" Held, no necessity having been shown to sell the real estate for the maintenance of the widow, that she took only a life estate.—JONES V. DEMING, Mich., 51 N. W. Rep. 1119.

125. WITNESS — Privilege. — One who has been duly summoned before a committee of the city council, to be sworn and testify in an investigation being conducted by said committee in the matter of the deposits of city moneys, and the default of the city treasurer, cannot refuse to be sworn on the ground that he is under indictment for conspiracy with the treasurer, involving the same transactions as those in regard to which it is sought to interrogate him, but must wait until after he is sworn and questioned before he can claim his privilege.—IN RE ECKSTEIN, Pa., 24 Atl. Rep. 63.

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CONTENTS.

EDITORIALS.

Technicality in the United States Supreme Court, 1
"Cruel and Unusual Punishment" for Selling Intoxicating Liquors, ... 1

NOTES OF RECENT DECISIONS.

Contract—Sale of Intoxicating Liquors to be Illegally Sold in Another State, ... 2
Breach of Marriage Promise—Immoral Consideration, ... 3

LEADING ARTICLE.

Suit in Equity to Enjoin Void Judgment, Assessment or Tax. By D. R. N. Blackburn, . . . 4

LEADING CASE.

Carriers of Freight—Discrimination—Common Law Liability. Cowden v. Pacific Coast S. S. Co., Supreme Court of California, May 6, 1892 (with note), ... 8

BOOK REVIEWS.

American and English Encyclopædia of Law, Vol. 17, ... 11
Ballard's Annual of the Law of Real Property, . 11
Ray on Contractual Limitations, ... 12
BOOKS RECEIVED, ... 12
QUERIES ANSWERED, ... 12
HUMORS OF THE LAW, ... 12
WEEKLY DIGEST OF CURRENT OPINIONS, . . . 13

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INDEX-DIGEST
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